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Faculty Scholarship

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1999

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## Publication Information

67 Fordham Law Review 2071 (1999)

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## Repository Citation

Failing, Marie, "Face-ing the Other: An Ethics of Encounter and Solidarity in Legal Services Practice" (1999). *Faculty Scholarship*. Paper 302.

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# Face-ing the Other: An Ethics of Encounter and Solidarity in Legal Services Practice

## **Abstract**

In this article, the author proposes that those who work in any capacity with impoverished clients and embattled minority communities imagine practice from within Levinas' key images. First, that ethics is first philosophy - that knowledge of the self, the Other and the context in which ethical action is possible does not precede ethical understanding, decision-making and action, but that rather that we become human in the ethical encounter with the incommensurable Other. Second, that representing a client is in each moment an encounter with the face of the Other. We look up into the face of the Other calling to us, looming over us, vulnerable. In this ambivalent moment, we face both the draw of the Other and the temptation to encapsulate, reduce, diminish, totalize the Other, to erase the chasms of incommensurability that threaten our control of our world

## **Keywords**

Poverty law, Office of the Economic Opportunity, Legal Services Corporations, Poverty-lawyering problem, Emmanuel Levinas

## **Disciplines**

Ethics and Political Philosophy | Legal Ethics and Professional Responsibility

# FACE-ING THE OTHER: AN ETHICS OF ENCOUNTER AND SOLIDARITY IN LEGAL SERVICES PRACTICE

Marie A. Failing\*

IN the 1990s, the legal intellectual community has seen a rich revival of the debates from the early years of the Office of Economic Opportunity and the Legal Services Corporation ("LSC")<sup>1</sup> about what it means to practice poverty law: a law practice at once zealous and broken-hearted, energetically seeking the victory of clients and their communities, yet at a loss for words in response to the incessant pleas for help turned away each day at Legal Services offices. The debate about what poverty lawyers must do poignantly contrasts a visionary hope for a "Beloved Community"<sup>2</sup> in which the poor are heard in their own voice and seen in their own humanity with the reality of

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\* Professor of Law, Hamline University School of Law. My thanks to Caroline Palmer for her thorough research and thoughtful comments, and to Nancy Holland and Karyn Sproles for good conversations about Levinas.

1. For a small sampling of these discussions, see, for example, Spiro T. Agnew, *What's Wrong with the Legal Services Program*, 58 A.B.A. J. 930, 931 (1972) (arguing that LSC is manned "by ideological vigilantes, who owe their allegiance not to a client . . . but only to a concept of social reform"); Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. Rev. 337, 384-90 (1978) (arguing that Legal Services lawyers should largely be held to the same standards as lawyers for others in the short run, but suggesting that the bar should modify unfairness in its ethical rules supporting the worst abuses of the adversary system); Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. Rev. 282, 344-52 (1982) (arguing for a deontological/client-oriented, rather than utilitarian/group-oriented, right to effective access to the courts, including legal assistance); Roger C. Cramton, *Crisis in Legal Services for the Poor*, 26 Vill. L. Rev. 521, 531-51 (1981) (refuting charges that LSC is a redistributive political instrument for activist lawyers rather than a poor people's program and that it is inefficient; also, describing possible effects of funding and authorization attacks by the Reagan administration); Warren E. George, *Development of the Legal Services Corporation*, 61 Cornell L. Rev. 681, 683 (1976) (arguing that the LSC needs to be sheltered from political interference, based on the history of the Office of Economic Opportunity's Legal Services program and LSC Act developments); Geoffrey C. Hazard, Jr., *Law Reforming in the Anti-Poverty Effort*, 37 U. Chi. L. Rev. 242, 242-44, 250-52 (1970) (arguing that law-reform litigation is a largely inadequate means of redistributing income or power to the poor, but that legislative activity is also difficult); James B. Pearson, *To Protect the Rights of the Poor: The Legal Services Corporation Act of 1971*, 19 U. Kan. L. Rev. 641, 647-50 (1971) (arguing for the need for the LSC to be independent).

2. Anthony Cook's attempt to describe the critical ideal as Martin Luther King, Jr.'s Beloved Community is unusual in that it embraces a theological vision, which anticipates that a relationship with God will manifest itself in love for the suffering, most particularly "the conversion of all social institutions and practices that maintained and reproduced poverty, racial oppression, and other social ills." Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 Harv. L. Rev. 985, 1026 (1990) (footnote omitted). Nevertheless, I think it fair to use the language because it poetically captures the longing of critical

daily defeat—clients silenced and bent, sometimes even by their own lawyers.

Given the modest aims of many poverty lawyers in a post-Reagan era, it is not surprising that the new poverty-lawyering literature focuses primarily on what is at stake in the lawyer-client relationship, and not on delivery systems and strategies.<sup>3</sup> In some of this literature, poor people are described as subordinated; they are silenced, they are disempowered, they are oppressed.<sup>4</sup> These are indeed words of relationship: They mean, literally, that poor people are pushed down, their mouths are stopped, their power is taken away from them, they are treated wrongly. Someone is the actor/subordinator, someone is the victim of wrongful action—even though often the actor is only vaguely described as “society” or not even named at all. Increasingly, the named oppressor is the lawyer himself or herself.<sup>5</sup>

These stories as stories of *relationship* occur over time. Subordination, disempowerment, oppression, silencing, to the extent that these relationships are legally and socially meaningful, have a history; they do not occur in a moment. The paradigmatic case is slavery: A slave is not fully subordinated, disempowered, and oppressed until he knows the master-person and master-culture so well as to know even

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scholars for relationship and harmony, interpersonally and socially, as well as the specific program on which many are focused.

3. Cf. Louise G. Trubek, *The Worst of Times . . . and the Best of Times: Lawyering for Poor Clients Today*, 22 Fordham Urb. L.J. 1123, 1133-36 (1995) (suggesting that post-modern discussions have had practical outcomes, i.e., the traditional LSC conflict between service and law-reform has been deconstructed, the López model of “rebellious lawyering” has brought new skills to bear on client problems, and “fem-crits” and “race-crits” have refocused lawyering attention on self-sufficiency and entrepreneurship strategies for low-income women and minorities).

4. See, e.g., Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 Hofstra L. Rev. 533, 534-35 (1992) (arguing that “socially subordinated groups,” including “socially powerless” poor black women tenants, are excluded from legal system procedures and protections and silenced by courtroom dynamics); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 Hastings L.J. 861, 911-14 (1992) (arguing that legal discourse suppresses and forcibly shapes poor people's stories); Louise G. Trubek, *Lawyering for Poor People: Revisionist Scholarship and Practice*, 48 U. Miami L. Rev. 983, 984-85 (1994) [hereinafter Trubek, *Lawyering*] (describing how Critical Legal Services has shown that law can “subordinate or legitimate the subordination of marginalized persons”); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 Buff. L. Rev. 1, 4 (1990) [hereinafter White, *Mrs. G.*] (advocating adoption of the perspective of marginalized groups and uncovering the construction of socially subordinated persons' speech as inferior).

5. Indeed, the nature of poverty-law ethical writings has changed focus from the concern that lawyers will take advantage of their clients' disadvantage and vulnerability by making paternalistic decisions for them, see, e.g., Bellow & Kettleson, *supra* note 1, at 340-42, 356-62, to arguments that lawyers discount their clients' wisdom, knowledge, or skills in handling their situations, see, e.g., Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 Yale L.J. 2107, 2127 (1991) [hereinafter Alfieri, *Reconstructive Poverty*]; White, *Mrs. G.*, *supra* note 4, at 45-46.

the implicit "rules," the emotions, beliefs, and habits of master-persons and master-cultures that will meet his words and acts with violence. Even a claim of "silencing," to be accepted as plausible enough for legal sanction in our culture, implies a prior relationship between the silenced person and the silencer-person or silencer-culture: A woman is "silenced" only when she knows what harm to expect from the man, or man-culture, that refuses to hear her.

I focus on a different poverty-lawyering problem: not the oppressive familiar relationship, but the non-relationship, the moment of unfamiliarity, the space between strangers. It is the problem sometimes described in legal literature as exclusion, the creation of "insiders" and "outsiders." Anthony Alfieri refers to "the exile-motif."<sup>6</sup> Admittedly, even the word "exclusion" implies at least a brief relationship, the opportunity for those with power to assess those excluded and make the choice to shut them out.

Yet, the notion of "exclusion" is somewhat different than other oppression language, because it raises a question which has been critical to contemporary lawyering practice: How can we act to make a difference in a universe of strangers, people who imagine their lives *as they now are*<sup>7</sup> solitarily—as vulnerable persons needing to be protected from violent strangers,<sup>8</sup> as individual "atoms" whose relationships are chosen and temporary? (To the extent that we do perceive our lives as structured in community, post-moderns still create that community by deliberate exclusion: Those who are excluded are most often people who do not fit our preconceptions of belonging—to us, to our group, to our community.)<sup>9</sup>

Poor people who come to the Legal Services door are paradigmatic outsiders: They literally come from outside the organizational community that Legal Services workers inhabit, making demands which

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6. Anthony V. Alfieri, *Impoverished Practices*, 81 Geo. L.J. 2567, 2611 (1993) [hereinafter Alfieri, *Impoverished Practices*]. For Alfieri, however, the exile-motif does not describe a reality so much as the "arrogant perception" of "distance between 'me' and 'the other'" with "me" as a "subject to myself with my own perceptions, motivations, and interests." *Id.* at 2611 n.195 (citation omitted); see also Joel F. Handler, *Law and the Search for Community* 22 (1990) [hereinafter Handler, *Search for Community*] (describing Bachrach's and Baratz's view that the "second face" of power operates to exclude participants and issues as well as to determine who gets to decide).

7. It is, of course, the task of post-modernism to come up with a vision of how our lives could be, launched from a re-vision of this understanding about how our lives in fact are. My point is only that if one would ask individuals what they predominantly experience as their lives, many would still give the modern answer: We are atoms in an indifferent universe.

8. See Jane Jacobs, *The Death and Life of Great American Cities* 31-41 (1961).

9. Joel Handler notes that "minority crits" have argued, with liberals, that autonomy is a necessary precondition for participation in society. Joel F. Handler, "Constructing the Political Spectacle": *The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 Brook. L. Rev. 899, 961-62 (1990) [hereinafter Handler, *Political Spectacle*].

are disruptive to the flow of legal business in the office. In the larger sense, many of them survive outside most *visible* systems of social expectations: "the" community that is composed of healthy, housed, gainfully-employed adults who live in functioning, self-sufficient family units and do not cause or get into any real "trouble."

At stake in this dilemma which is framed by words like "stranger," "outsider," and "excluded," are three significant concerns. First, in light of the critical post-modern question—how shall we account for and respond to alterity—with what eyes, with what vision, does a poverty lawyer see the person who comes to his or her door? This question takes for granted that poverty lawyers enter into a relationship with the potential "Client/Other" largely blinded to his or her life circumstances, life-story, life-imagination. Second, given what has been learned about the vastly different languages that impoverished clients, their lawyers, and the legal system speak, how can a lawyer and client have a conversation which constitutes communication? Third, again, how from incommensurability can lawyer and client find a relational path that allows for concrete action in the face of disjunctures of understanding, perspective, and will?

I propose simply to add some texture to the discussion of the first and third of these questions, borrowing images and ideas from the French philosopher Emmanuel Levinas's work on ethics and the face of the Other,<sup>10</sup> as well as others' attempts to describe solidarity in ethics. I urge that those who work in any capacity with impoverished clients and embattled minority communities imagine practice from within Levinas's key ideas:

(1) Ethics is first philosophy—that knowledge of the self, the Other, and the context in which ethical action is possible does not precede ethical understanding, decision-making, and action, but rather that we become human in the ethical encounter with the incommensurable Other; and

(2) Representing a client is in each moment an encounter with the face of the Other. We look up into the face of the Other calling to us, looming over us, vulnerable. In this ambivalent moment, we are both drawn to the Other and tempted to encapsulate, reduce, diminish, totalize the Other, to erase the chasms of incommensurability that threaten our control of our world.

Levinas provides the vision: the ethics of encounter. The sheer force of this moment of encounter, however, threatens to leave us paralyzed, mute. The encounter provides no words, no articulable way to

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10. I do not propose to re-phrase Levinas's argument, made most directly in Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority* 194-219 (Alphonso Lingis trans., 1969). In addition to my differences with his argument, it is complex beyond the scope of this Article (and, I fear, my complete understanding!). However, Levinas's images and claims usefully and dramatically re-imagine the relationship with the Other.

come to a decision about what we must do, even though the encounter changes us profoundly, including what we are impelled to do. For the second moment, the language of solidarity may provide an (admittedly second-best) option for articulating how we convert experience of encounter with the Other into action.

I. ENCOUNTERING THE OTHER AGAIN FOR THE FIRST TIME:  
WHERE WE HAVE BEEN BEFORE

A. *Locating the Concern of Poverty Law Ethics in the  
Post-Modern Discussion*

The preoccupation with the Other in post-modern ethics is described in different terms, depending on which facet of the luminous, many-sided crystal of post-modern experience ethicists concentrate on. For some, the glass surface which reflects light to them is best described in the language of foundationalism against contingency. The two poles of that conflict are represented by those who claim that objective truth can be discovered by impartial and reflective human reason<sup>11</sup> and those who argue that all human knowledge and relationship is socially (perhaps even individually) constructed, so that each moment of experience is purely subjective and utterly unstable, at least insofar as truth-claims are concerned.<sup>12</sup> Gary Blasi wryly suggests how the ultimate post-modern critical lawyer would explain his lawyering relationship to his homeless client:

Because there can be no universal, fundamental, or essential standpoint, we pay a lot of attention to who *we* are. We understand that no lawyer, advocate or *other* can truly speak *for* any single person. . . . Further, even the notion of that one person, as subject, is false. People are not representable in any ordered sense of self or interests. People are but eddies in the turbulent cross currents that comprise them. All questions are contingent on assumptions that are infinitely reflexive. All answers are evanescent, becoming false

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11. Alfieri claims that modernism gives rise to a formalist and instrumentalist vision of lawyering practice, both having foundational assumptions. See Alfieri, *Impoverished Practices*, *supra* note 6, at 2574-75. Formalists claim "neutral and purposive discretion," the "capacity to discover objective truth," a "belief in empathy as a means of understanding" the other, and the determinacy of sociolegal contexts. *Id.* Instrumentalists argue for "purposivist exercise" of lawyering discretion, endorse a provisional understanding of truth found through practical reasoning, and argue for translation as a method of "normatively enlightening others." *Id.* They believe that sociolegal contexts are relatively indeterminate, functioning unstably in an arena of loosely constrained choice, objectivity, empathy, and determinacy, driven by the assumptions of autonomy and cognitive capacity (including the capacity to discover objective truth for formalists). See *id.*

12. See Handler, *Political Spectacle*, *supra* note 9, at 959-65 (criticizing the Critical Legal Studies ("CLS") position that civil-rights law is socially constructed to reflect the interests of the powerful, and "mystify and pacify the oppressed," thus making the position of minorities worse). Handler claims that CLS argues that "there is no such thing as objective, neutral legal rules." *Id.* at 959.

even as they are spoken, as they suppress other questions and other answers. In less radical form, we believe that we should listen, knowing that we never fully understand and that we must resist imposing our projected orderings and normative sense onto others.<sup>13</sup>

Levinas states (quite pithily) the ethical problem that this debate between foundational and contingent arguments raises: "Everyone will readily agree that it is of the highest importance to know whether we are not duped by morality."<sup>14</sup>

For others, the crystal facet best exemplifying the post-modern dilemma reflects the tensions between theory and practice,<sup>15</sup> between abstraction and concrete context, and between idea and material daily life. Richard Rorty describes the social-ethical aspect to that tension when he notes that reflective people give sense to their lives either by telling the story of their contribution to an actual historical or imaginary community, or "[by] describ[ing] themselves as standing in immediate relation to a nonhuman reality."<sup>16</sup> Rorty suggests that the post-modern debate pits pragmatists against realists who must ground their solidarity with the entire human community by finding a way to justify which beliefs are "natural and not merely local," by finding correspondence "between beliefs and objects which will differentiate true from false beliefs."<sup>17</sup> For pragmatists, by contrast, no such correspondence between beliefs and objects is necessary, and "the gap between truth and justification [is] not . . . something to be bridged by isolating a natural and transcultural sort of rationality which can be used to criticize certain cultures and praise others, but simply as the gap between the actual good and the possible better."<sup>18</sup>

For still others, the most significant facet of the post-modern crystal is the tension between constituted community and the exclusion of those who do not fit, described negatively as parochialism or partial-

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13. Gary L. Blasi, *What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 U. Miami. L. Rev. 1063, 1077-78 (1994).

14. Levinas, *supra* note 10, at 21. Levinas's particular context for this remark is his shaken admission that "[t]he state of war suspends morality; it divests the eternal institutions and obligations of their eternity . . . . [Yet,] [t]he art of foreseeing war and of winning it by every means—politics—is henceforth enjoined as the very exercise of reason." *Id.* If the politics of war, which obliterates the authentic actions of moral people, and instead "mak[es] them carry out actions that will destroy every possibility for action," is indeed reasonable, then the justification of its opposite, morality, through "rational" means becomes problematical. *Id.*

15. See, e.g., Blasi, *supra* note 13, at 1082, 1087 (arguing that post-modern poverty lawyers should not abandon theory). Blasi asserts that theory is necessary to look for "structure or explanation above the level of local narrative," to see order in otherwise meaningless "noise." *Id.* at 1087 (footnote omitted). He encourages poverty lawyers to speak to each other about "things that are otherwise nearly impossible to verbalize." *Id.* at 1082.

16. 1 Richard Rorty, *Objectivity, Relativism and Truth: Philosophical Papers* 21 (1991).

17. *Id.* at 22.

18. *Id.* at 22-23.



ity. At the structural, political or communal level, the exclusion debate centers on the will for power. The historical nightmare which terrifies post-modern debaters is that Nazism, "the exemplar of totalitarianism *par excellence*,"<sup>19</sup> will be replicated in our time, because we will not have taken the time to learn its lessons about the Other. However, those who see the post-modern problem through this facet disagree on which of Rorty's three options—affirmation of a particular historical community, solidarity with imaginary communities, or connection directly with a universal ideal—is more dangerous for the Other.

Kosovo, Kuwait, Rwanda, and Belfast provide ample evidence that individuals' identification by ethnicity or nationality with particular historical communities, coupled with the abuse of power, brings forth the destruction of human identity, "making [the violent] play roles in which they no longer recognize themselves, making them betray not only commitments but their own substance."<sup>20</sup> However, identification with ideal communities is equally suspect as a potential source of totalitarianism: Philosopher Jean-Luc Nancy shows the proven danger in attempting to create an organic community through analogy to a mythical one—in the Holocaust, where solidarity with the imagined community blended of Greek and German mythos required the extermination of "everyone who was not immanent in the organic community [the Nazis] were fictioning."<sup>21</sup> Finally, direct identification with abstractions holds its own exclusionary possibilities: Theologian Johannes-Baptist Metz suggests that the logic of direct relationship with "non-human reality," or "occidental rationality . . . is a logic of domination, not of recognition: it is, at any rate, a logic of assimilation and transformation, not a logic of otherness."<sup>22</sup> The move from excluding to totalizing to annihilating the Other is, then, easy in the post-modern view. What ethicists cannot agree on is which devil should be feared most: Whether affiliation with particular or imaginary communities (Rorty's solidarity) or with rights ideals (Rorty's objectivity) is most likely to result in the Other's erasure.

Poverty law practice presents another facet adjacent to the political problem of exclusion: the problem of the interpersonal, the face-to-face. As post-modern ethics poses the problem, refusal to encounter the Other as other is the refusal to take him seriously as a citizen—or as a human being. To elide the problem of incommensurability is to

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19. Todd May, *Reconsidering Difference: Nancy, Derrida, Levinas, and Deleuze* 30 (1997) (describing Jean-Luc Nancy's arguments about organic communities).

20. Levinas, *supra* note 10, at 21.

21. May, *supra* note 19, at 30-31. Nancy notes that since the imaginary community was indeed not immanent, everyone was potentially subject to extermination, so that Nazism was, in fact, suicidal. *See id.*

22. Johann-Baptist Metz, *Freedom in Solidarity: The Rescue of Reason, in Faith and the Future: Essays on Theology, Solidarity, and Modernity* 72, 72-73 (Johann-Baptist Metz & Jürgen Moltmann eds., 1995).

fail to truly respect the Other. Any attempt to assimilate the Other to one's own world-imagination by assuming sameness, by constructing the world in categories of one's own making and assigning the Other to them, diminishes the dignity—indeed, the sacredness—of the human person. To imagine the Other as simply a part of one's own life history is to be unable to accord her the concern she demands as a person.

Poverty law ethicists keep asking, “what is wrong with this picture?”—this daily interrelating of poverty lawyer to client, from the initial intake to the traces left behind when the client disappears from view. In the new, as in the old, debates, they recognize that this question applies both to the dilemma of “who is my client?” and to the conundrum of “how do I communicate and act with that client?” The ethics of encounter proposes that the ethical moment is one and the same as the initial moment of encounter. It argues that ethics is not a thought process engaged in by an autonomous subject about his potential actions toward another, his object. Rather, ethics is the relation established in the face-to-face, nurtured but not constituted by communication. I contend that three of the significant relational ethics theories applied to poverty law, though each providing lawyers some help, ultimately leave nagging problems of application behind, while an ethics of encounter may more realistically confront the difficult problem of the client's incommensurability.

### B. *The Recent History of Poverty Law Ethics in Four Stories*

To help us visualize the “history” of relational conceptions of lawyer and client, permit me to re-describe four well-known (some imaginary, some real) “experiences” with clients that have been related by legal ethicists. These narrative summaries provide us with perfunctory stories about how various movements in ethics describe what is at stake in re-imagining the poverty lawyer-client relationship.

#### 1. Little A.

A woman, Little A., comes to me for legal assistance. She is battered and ambivalent about whether she is willing to escape with her children to a shelter and file for divorce. She believes, however, that without a lawyer, her husband will continue to beat her relentlessly, and her instincts say that his violence may escalate into a serious or even life-threatening situation for her. My only problem is that I have already decided to spend the next year working on a major welfare impact case which will take all of my time if I do it right, other than what I need for myself and for my family. At the outset of my career, I made the decision that the greatest need I could serve using my talents would be in changing welfare laws to be more humane and I have

stuck by that commitment.<sup>23</sup> My client Juanita M. is counting on me to help her fulfill her dream of getting off welfare and becoming a nurse; and I have made a firm commitment to her and her children.

Moreover, I have to admit, I derive satisfaction out of impact work; it fulfills my needs as a professional. After all, I am a "responsible, valuable and valuing agent" who must first of all be "dear to [my]self"; my concern for others must "presuppose a concern for [myself]."<sup>24</sup> Because I am a person, not a resource, I am entitled to bestow my talents and time entirely according to my own discretion. I have chosen to make a commitment to my particular client, Juanita M., and to lavish my legal care upon her. That relationship has its own moral worth and obligation, because she can trust me and I am meeting her needs.

## 2. Mrs. Jones

Mrs. Jones, a church-going, respected member of a lower-middle-class black community in Boston, came to my law firm because she worked as a part-time housekeeper for my senior partner.<sup>25</sup> She "was charged with leaving the scene of a minor traffic accident"<sup>26</sup> by the other (white) driver who later called the police and reported her; she claimed it was the other way around—the white driver had left the scene without stopping.<sup>27</sup> Nervous about her first brush with the police in her sixty-five years, and upset at being reprimanded like a child by the police, who simply took the other driver's word for what happened, "she was obviously a charming person"<sup>28</sup> and "her credibility was off the charts."<sup>29</sup>

When she and I went to the courthouse for our first appearance, we found the other driver's car and I took a Polaroid of his car's dent and a paint chip the color of my client's car, which helped to confirm my client's story. Because I had never tried a case or done any criminal work, I asked a friend to co-counsel with me.<sup>30</sup> When we discussed

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23. This is the argument (the fact scenario is my construction) that Charles Fried makes in his famous essay, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060, 1068-71, 1077-78 (1976). Most commentary on the essay has revolved around Fried's discussion of the use of immoral means to vigorously represent clients; it is often forgotten that Fried uses the same argument to justify the *choice* of clients in the first place. Fried suggests that the absolute discretion to choose clients is limited, but only in exceptional cases: i.e., a client whose needs fit his particular capabilities and who could not otherwise find counsel, or a case where the lawyer was appointed by the court to represent a criminal defendant, again one who could not find other counsel. *See id.* at 1078-79.

24. *Id.* at 1069.

25. William H. Simon describes this case in *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 Md. L. Rev. 213, 214-16 (1991) [hereinafter Simon, *Mrs. Jones*].

26. *Id.* at 214.

27. *See id.*

28. *Id.*

29. *Id.*

30. *See id.*

theories of the case, he witheringly dismissed my idea to expose police racism through cross-examination, explaining that the judge and police were "repeat players . . . who shared many common interests."<sup>31</sup> Instead, he began negotiations with the prosecutor, who offered a *nolo contendere* plea with a criminal record, six months' probation, and the possibility of a sealed record after a year.<sup>32</sup>

When I presented the offer to Mrs. Jones and her minister, who came as a character witness, we argued about whether I would tell her what I thought she should do, because, as they said, "you're the expert. That's what we come to lawyers for."<sup>33</sup> I insisted I couldn't tell her what to do, and spelled out the pros and cons, mentioning the cons last and adding that if she took the offer, "it wouldn't be total justice."<sup>34</sup> Previously ambivalent, she and her minister said, "We want justice."<sup>35</sup> My co-counsel, incredulous at her choice and my presentation, re-explained the considerations to them, saving the disadvantages of trial for last, describing the remote possibility of jail more, and not mentioning anything about "justice." Mrs. Jones and the minister decided to accept the plea bargain. I remained silent.<sup>36</sup>

### 3. Mrs. G.

Mrs. G. came into the office for help with a welfare overpayment notification she received.<sup>37</sup> I was struck by the way she talked when I first met her. "She would get very excited when she spoke, breathing hard and waving her hands and straining, like she was searching for the right words to say what was on her mind."<sup>38</sup> As I called her in between two clients already booked, an unscheduled appointment in an already-booked day, she "looked frightened."<sup>39</sup> Although I told her she did not have to attend the welfare department fraud meeting on the notice, which seemed to relieve her, she went anyway. Then she showed up at her later appointment with me, upset and "waiting for me to yell at her or tell her to leave. . . . [She was] caught between two bullies, both of us ordering her what to do. . . . I was furious."<sup>40</sup>

Why had she gone to the fraud appointment and signed the repayment contract? . . . Why hadn't she listened to me?

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31. *Id.*

32. *See id.* at 215.

33. *Id.*

34. *Id.*

35. *Id.* at 216.

36. *See id.*

37. This is the story of Lucie White's Mrs. G., from White's point of view in White, *Mrs. G.*, *supra* note 4, at 22-24.

38. *Id.* at 22.

39. *Id.*

40. *Id.* at 23-24.

Mrs. G. just looked at me in silence. She finally stammered that she knew she had been "wrong" to go to the meeting when I had told her not to and she was "sorry."<sup>41</sup>

When I questioned her at her overpayment hearing about her worker's telling her that she could spend a personal injury insurance check she showed the worker, she stammered, said she could not remember, and became uncomfortable. Maybe it was from shame, maybe to avoid scapegoating her worker (another black woman), maybe to avoid retaliation when the office mismanagement was exposed. Yet, when I questioned her about why she needed to buy new Sunday shoes for her girls (one of the necessities on which she spent her insurance money), "her voice sounded different—stronger, more composed—than I had known from her before. . . . Suddenly I was on the outside, with the folks on the other side of the table, the welfare director, and the hearing officer."<sup>42</sup>

#### 4. The Stranger

"'Yeah,' he said, 'we used to call it *nigger removal*.' Pretending not to hear, I looked away to the soot-coated New England church where the night meeting had just ended,"<sup>43</sup> with people milling around talking about better policing, housing, streets. "I didn't know the man's name. We had happened to walk out of the meeting together. In the dim street light, I could see only a short and thickset black figure."<sup>44</sup> When he answered my question with a question about what I was doing there, I told him that I was coordinating community outreach and he smiled. When I asked him about the community's problems, he laughed. "Yeah . . . in the sixties they called it *urban renewal*. They kick you out of your house, move you away from your neighborhood, and put you up in a high-rise where you don't know anybody."<sup>45</sup> When I asked him if he wanted to organize a community group to improve the neighborhood, he said, "urban renewal . . . nigger removal."<sup>46</sup> Then he turned and walked away. It was my first meeting to organize community education and outreach for a Legal Services housing unit in a racially and ethnically-mixed neighborhood.

As I suggested, this progression of incidents could almost represent chapters in a history on recent developments in conceptions about the lawyer-client relationship. Charles Fried's classical conception of the lawyer as "special-purpose friend" represented in the Little A. story

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41. *Id.* at 24.

42. *Id.* at 31.

43. Anthony V. Alfieri, *Practicing Community*, 107 Harv. L. Rev. 1747, 1747 (1994) [hereinafter Alfieri, *Practicing Community*] (reviewing Gerald P. López, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (1992)) (recounting Alfieri's own experience).

44. *Id.* at 1748.

45. *Id.* at 1747-48.

46. *Id.* at 1748.

suggests an almost pre-Rawlsian liberal moment in lawyers' ethics.<sup>47</sup> That is, in the story, the lawyer has indulged in isolated reflection on the nature of his practice and "chosen" to adopt and consistently follow an autonomy model. He justifies that model deontologically, on the basis of Enlightenment values such as liberty and equal respect for persons,<sup>48</sup> universalizability of principles and treatment of people as ends rather than means.<sup>49</sup> Perhaps most importantly, Fried posits a pre-existing, pre-formed subject—the lawyer—as the agent for choice and action in ethics.

Fried's lawyer also acts consistently with liberal process, at least in some ways: The lawyer has anticipated what he would want done for him, as if under a veil of ignorance, and has separately deliberated about a set of rational principles justifying partiality toward his self-chosen clients.<sup>50</sup> Yet, his deliberations suggest no "awareness of reciprocity" in adopting first principles or even applying them, no sense that the lawyer's decisions "depend on the results of exchanging theoretical positions with others."<sup>51</sup> Thus, the substantive principle of equal respect turns out to be a large dose of choice language, which incorporates the idea that the lawyer-as-friend has the responsibility to adopt the client's interests as his own, preserving the client's autonomy against the legal system but not his autonomous interest in participating in case acceptance or throughout representation.

William Simon's (Mrs. Jones) story<sup>52</sup> of himself as a young lawyer represents the next modern moment in the development of lawyer-client praxis ethics. This time, the lawyer is paying attention to aspects of Mrs. Jones's circumstance and personality, though he does not hear her voice over the din of his own nervousness about his ethical duties (abstractly and separately conceived) and his self-absorption with representing his client competently, even at the end. Young Simon quickly assimilates the case in a characteristically modern way: He constructs an "objective" fact scenario with a dual narrative, one, his client's given tale, and the other, his adversary's imagined one. Then he proceeds to collect "scientific" evidence (the paint chip) corroborating the first narrative, and enlists a colleague in framing a series of causal predictions, depending on whether Mrs. Jones settles or

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47. Fried, *supra* note 23, at 1071-73.

48. For this description of Rawlsian deliberation, see Susan G. Kupfer, *Authentic Legal Practices*, 10 Geo. J. Legal Ethics 33, 77-81 (1996). As one example, Fried argues, "[i]f I claim respect for my own concrete particularity, I must accord that respect to others," thus giving the lawyer some responsibility not to create a relationship of harm with his client's adversary. Fried, *supra* note 23, at 1083.

49. Fried several times decries the utilitarian treatment of both lawyer and client as means rather than ends, claiming that asking a lawyer to expand his talents where they will do the most good says "to the lawyer that he is merely a scarce resource. But a person is not a resource." Fried, *supra* note 23, at 1078.

50. See Kupfer, *supra* note 48, at 77-78.

51. *Id.* at 78.

52. See *supra* notes 25-36 and accompanying text.

goes to trial, complete with a risk probability assessment. At the same time, yet *wholly apart from* this objective endeavor, young Simon assesses Mrs. Jones's character; he decides intuitively on the morality of the representation based on his experience and corroborating evidence that she is an honest, decent, and "charming" person maligned by indifferently-racist police and a malevolent adversary. The "scientific" process of "proving" his client's case and the "subjective" process by which young Simon becomes morally "satisfied" that he is doing the right thing seem to have almost nothing to do with each other.

Simon, like Fried, has accepted the validity of the universal principle of autonomy, but there is an important change. First, after he "gets his act together" on the objective facts and possibilities, it is his client's autonomy, and not his own, which is the focus of his concern. Indeed, his abstract recognition of his own autonomy and his practical deference to his client's autonomy serve as precursors for recognizing the need for both lawyer's and client's voices in the representation. Second, young Simon actually debates the client and the minister about whether he should tell her what to do, a slight step forward in its recognition of the value both of dialogical reciprocity and of the inclusion of relevant others.<sup>53</sup>

Third, young Simon notes the importance of a concern for justice and fairness that is larger than what the law will give, signaling the re-appearance of the lawyer's moral sense into the ethical dialogue, a possibility opened by David Luban, among others, in the late seventies and early eighties.<sup>54</sup> The young Simon has not come to the same place that the ethicist Simon will later on, arguing that lawyers have separate ethical discretion to be exercised by refusing to pursue "legal" courses of action that violate the justice that the laws are attempting to achieve.<sup>55</sup> But at least there are hints that he is not going to play the role of "hired gun" or "special-purpose friend," passively deferring to anything his client might propose, no matter how shocking.

Finally, in a glimpse of the post-modern, Simon acknowledges the power of language in shaping the relational reality of lawyer and client:

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53. See generally William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1083 (1988) [hereinafter Simon, *Ethical Discretion*] (arguing that lawyers should have discretion in choosing which clients to represent and how to represent them).

54. See, e.g., David Luban, *Lawyers and Justice: An Ethical Study* at xviii (1988) (discussing the ethical problems lawyers face in client representation).

55. See Simon, *Ethical Discretion*, *supra* note 53, at 1090-91. This kind of argument, relying on norms internal to the legal system, see *id.*, is somewhat different from David Luban's claim that lawyers should directly confront moral concerns extrinsic to law, see Luban, *supra* note 54, at 160-61.

As you probably surmised from the way I told the story, I think Mrs. Jones's initial decision not to accept the plea bargain was influenced by the facts that I went over the disadvantages of the plea bargain last, that I concluded by saying, "It wouldn't be total justice," and that my tone and facial impressions implied that justice should have been a decisive consideration for her. I think her ultimate decision [to accept the plea bargain] was influenced by the facts that my friend discussed the advantages of the plea bargain last, went over the jail possibility at more length, omitted any reference to justice, and implied by his manner that he thought she should accept the bargain.<sup>56</sup>

By the time we get to Lucie White's story of Mrs. G.,<sup>57</sup> we see even further movement. Now, the lawyer is not simply noting the client's display of emotions in her office and trying to assimilate them to the lawyer's evaluation of the client's virtue, as in young Simon's case. Instead she is trying to imagine what would make Mrs. G. breathe so hard, wave her hands, and all this in the context of Mrs. G.'s two stone-faced children standing beside her. She is, in a word, caught up in the mystery which is her client; contingency has replaced an objective analysis of a person, and context has replaced principle as a means for action as well as dialogue. Brought up on the client-autonomy model, the lawyer first gives Mrs. G. some choices, but mindful of her responsibilities to other clients not in the room, she proceeds eliminate choices and moves to action without even asking for the truly complex story the client has to tell.

At least in White's story, unlike young Simon's, when the client returns after having gone to the welfare-fraud interview and signed papers against her interest, lawyer and client actually have an exchange of hearts as well as minds: White speaks out of her fury, and Mrs. G. answers in silence and contrite apologies. It is a small step toward recognition of mutual vulnerability and respect. Though the lawyer still wields unequal power, playing the moral trump card of "choice" against Mrs. G.—the client's previous agreement (thus moral "promise") that she would not go to the fraud interview—at least they are opening themselves to each other. Post-modern reciprocity is starting to win out, even with White's relapses into the modern, including her attempt to predict alternatives and to defer to her client's autonomy. It is Mrs. G.'s story, in the end, that prevails, both in the sense that her values are finally reflected in her own, unmanipulated words; and in the sense that it makes a difference in the outcome, in the perspectives of her hearers.

I would suggest, however, that Anthony Alfieri's story of the Unnamed Stranger<sup>58</sup> most candidly characterizes the moment in which

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56. Simon, *Mrs. Jones*, *supra* note 25, at 217-18.

57. See *supra* notes 37-42 and accompanying text.

58. See *supra* Part I.B.4.



the poverty law ethicists find themselves today. Alfieri is struck silent at the radical otherness of the stranger, averting his eyes, almost as if ashamed at his speechlessness to the other's speech. Unlike Mrs. G., who is known well enough that plausible alternatives to explain her departure from their agreed-upon "script" start to emerge in White's mind, Alfieri's stranger comes out of nowhere and just as quickly disappears. Unlike White, who can see how she probably has gone wrong with her client, young Alfieri is befuddled: He has not [yet] violated the modern ritual of autonomy nor the post-modern canons of mutual respect and dialogue, and yet the Stranger laughs. The Stranger's response to Alfieri's attempts to recruit him or even to explain what Alfieri is doing in the community betrays the sheer incommensurability of their worlds: young Alfieri's world of reflective practice, of the vision of collective action in pursuit of the "Beloved Community," and the Stranger's own world, practical, needy, proud, bitter, but ultimately elusive, unable to be cabined even by speculation.

Post-moderns might find in this story evidence that the subject—Alfieri—is indeed shattered, that he has no authentic voice or even the least identity. They might claim that the immense chasm of difference between Alfieri and the Stranger marks radical contingency and proves the impossibility of truth-claims, making the case for radical skepticism and "profound uncertainty about the very possibility of human survival."<sup>59</sup> They might offer that what Alfieri does next—how he reconstructs a self, and how he acts in the face of darkness—are entirely unknown, entirely up to him, entirely illusory. Yet, at this very moment, Levinas claims, violence ceases to exist.<sup>60</sup>

## II. RELATIONAL ETHICS OPTIONS AFTER GILLIGAN

While it does injustice to the richness of individual works, we might consider how some currents of argument in the past decade's stream of poverty law ethics respond to the post-modern question Alfieri's Stranger so abruptly presents. I would like to focus on three distinct discussions that explicitly pursue the possibility of a relational ethics for lawyers: following from Fried's problematical "lawyer as friend" metaphor, the language of friendship and loyalty as lawyerly virtues; the subsequent post-Gilligan discussion contrasting the ethics of care with the ethics of rights, and the complex debate I will refer to as

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59. Marie Ashe, "Bad Mothers," "Good Lawyers," and "Legal Ethics", 81 Geo. L.J. 2533, 2533 (1993).

60. See Levinas, *supra* note 10, at 203, 290-91 (stating that the face "arrests and paralyzes my violence by his call, which does not do violence, and comes from on high").

"dialogical praxis,"<sup>61</sup> admitting that I am tarring a large number of often-disagreeing theorists with that brush.

### A. *Friendship and Loyalty*

Though Fried's notion of "lawyer as special-purpose friend" has been roundly criticized by legal ethicists,<sup>62</sup> the ethical image of friendship has continued to be discussed as a possible model for the lawyer-client relationship. Indeed, Fried has been as much criticized for the way in which he defined friendship as for his suggestion that lawyers should practice it with their clients. Friends, the criticism goes, do not simply do what their friends want, no matter how odious or damaging to the moral self their friend's demands may be.<sup>63</sup> They are not just friends to further the friend's interest or autonomy; they are friends because of the intrinsic worth of the relationship, the mutuality of their values, and the sacredness of the person. A friend will challenge a friend as much as support her, will say "no" as much as "yes" to the friend's demands, all in support of the moral possibilities cherished by the friend and the self.

The friendship model (at least post-Fried) with its attendant virtue of loyalty, speaks to some of post-modernism's problems with traditional lawyer-client models. First, the friendship model at least partially rejects a deformed ethics of autonomy, "the ethics of aloneness"<sup>64</sup> that leave others, including the client, out of the moral

61. For examples of scholars that have put different labels to the themes that I am covering with "dialogical praxis," including a humanist vision of procedural justice, see White, *Mrs. G.*, *supra* note 4, at 2-3; and for dialectics or dialectical praxis, see Handler, *Political Spectacle*, *supra* note 9, at 962-63 (reviewing Elizabeth Schneider's work on "dialogical praxis"), and Trubek, *Lawyering*, *supra* note 4, at 993 (discussing objections to "situational and theoretical practice").

62. See, e.g., Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers, Clients, and Moral Responsibility* 44 n.3 (1994) (analogizing Fried's friend to the "hired gun" lawyer); Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 Duke L.J. 631, 640 (criticizing Fried for defining a friend as an agent or extension of the self for one's own purpose); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 63, 81 (1980); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 30, 108-09 [hereinafter Simon, *Ideology of Advocacy*] (comparing Fried's "friend" to a Sunoco dealer). Levinson instead offers the Platonic definition of a friend as a person "of the same character, who agrees with [one's] tastes and dislikes." Levinson, *supra*, at 640 (quoting Plato, *Gorgias* \*510c (alteration in original)).

63. See, e.g., Ashe, *supra* note 59, at 2541 (challenging Fried's willingness to bracket or subordinate the lawyer's values as advocacy of "surrender to a state of resignation that comes as close as any human choice can to what we might tend to call 'relativism'").

64. Thomas L. Shaffer coined this phrase in *The Legal Ethics of Radical Individualism*, 65 Tex. L. Rev. 963, 970 (1987); see also Edmund D. Pellegrino, *Patient and Physician Autonomy: Conflicting Rights and Obligations in the Physician-Patient Relationship*, 10 J. Contemp. Health L. & Pol'y 47, 48 (1994) (arguing that autonomy has been distorted from its original meaning into a principle of non-interference. In the original, autonomy is as a "right of persons to freedom of conscience and . . . respect as agents capable of making their own judgments in accord with universal moral prin-

equation (yet avoiding models objectionable to modernity, such as paternalism).<sup>65</sup> That is, the language of friendship accepts the situatedness of the individual, that he or she—and his or her promises and consent—are created out of (and because of) community, not prior to community.<sup>66</sup> Because it is based on a living, particular relationship, the model implicitly accepts the priority of the contextual and concrete over the impartial and the abstract in the ethical process. In our culture, the friendship model also accedes to a complex pluralism of social activity and commitment not governed by monolithic principle or structure. As Sanford Levinson suggests:

In our own society—as opposed, perhaps, to the ancient polis—we are what might be termed “plural selves,” torn between various social reference groups that serve as sources of personal identity and integrity.

. . . .

The very recognition of conflict [of our loyalties] means that our competing identities and commitments cannot necessarily be placed into a neat rank-order whereby we might know, in any given situation, which particular relationship . . . should take priority over its competitors.<sup>67</sup>

As befits the post-modern paradigm, friendships tend to be uniquely egalitarian, dialogical, and reciprocal. In short, friendships are relationships that recognize that the self finds meaning from “dialectical interaction rather than mere ‘exchanges’ between radically separated ‘individuals.’”<sup>68</sup>

Friendship, and its particular manifestation in loyalty, engenders:

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ciples”). *But see* Handler, Search for Community, *supra* note 6, at 15 (defining autonomy, citing ethicists Tom Beauchamp and William Connolly, as “being one’s own person” and having the capacity for self-governance, including “a stable system of values and goals, the ability to understand facts, and a capacity for reasoning, intelligent deliberation, and self-reflection”).

65. *See* Pellegrino, *supra* note 64, at 50-53 (arguing that the medical profession has wrongfully accepted a conflict between beneficence and autonomy to avoid paternalism); *see also* Paul J. Zwier & Dr. Ann B. Hamric, *The Ethics of Care and Reimagining the Lawyer/Client Relationship*, 22 J. Contemp. L. 383, 392 (1996) (arguing that a client-centered approach may still be self-interested because it incorporates the lawyer’s interest in financial remuneration and independence).

66. *See* Zwier & Hamric, *supra* note 65, at 390-91, 406-07, 421 (arguing, in the context of a case about husband and wife wills, that the family relationship creates the promises, contracts, consent and harmony which bind members of the family; it is not the consent and promises of autonomous individuals which create the family). Alternatively, Levinson suggests that the protection of certain relationships “emphasizes the self as importantly *social* . . . the constitutive role of community membership in defining what it means to be a genuine self.” Levinson, *supra* note 62, at 641 & n.31; *see also* Cook, *supra* note 2, at 1007 (arguing that alienation is socially produced, and the natural inclination of individuals is for connection with others, a mutual acknowledgment of humanity and empowerment).

67. Levinson, *supra* note 62, at 635.

68. *Id.* at 641.

- *Stability*—a relationship that is maintained over time;<sup>69</sup>
- *Security*—some kind of protection against betrayal at least by those who call themselves our friends, if by not strangers; and some glue to hold relationships together in spite of “temporary disaffection.”<sup>70</sup> Such security, in a friendship context, permits both intimacy and vulnerability of friends to each other.<sup>71</sup>
- *Distinction or value*—the ability to be seen for all of our complexity and uniqueness, as well as to distinguish ourselves by whom we are loyal to, indeed to locate ourselves in a history of our own acts and relationships of loyalty.<sup>72</sup> We might also refer, in a friendship, to the qualities of affection and admiration,<sup>73</sup> or the fact that friends enjoy each others’ company.<sup>74</sup> Or we might cite to the maxim that friends perceive their friends as a “Thou” rather than merely a means to some other end.<sup>75</sup>
- *Integrity*—as Fletcher explains, “[i]n acting loyally, the self acts in harmony with its personal history. One recognizes who one is. . . . The self sees in its action precisely what history requires it to do.”<sup>76</sup>

Yet, even using post-Fried definitions of friendship, it is hard to mount a convincing argument that the virtue of friendship should apply in lawyer-client relationships, particularly in the formation stage.<sup>77</sup> Ironically, that may be due in part to the drawbacks embedded in loyalty’s virtues, such as:

- *Insecurity*—the competitor for our loyalty is excluded from the relationship, yet always “lurking in the wings . . . always tempting, always seductive” such that we can never be completely certain of our

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69. See George P. Fletcher, *Loyalty: An Essay on the Morality of Relationships* 7 (1993). But see Benjamin E. Rosenberg, *Quando Fidelis?: Drawing the Line Between Loyalty and Impartiality*, 82 Cal. L. Rev. 717, 718 (1994) (reviewing George P. Fletcher, *Loyalty: An Essay on the Morality of Relationships* (1993)) (criticizing Fletcher’s arguments as “transparent tools that reflect [his] own biases and political orientation”). Fletcher notes that loyalty feelings “raise the cost of exit by exacting a psychological price. . . . [I]t serves a rational purpose of ensuring, in Eric Erikson’s *bon mot*, that people ‘actively stay put.’” Fletcher, *supra*, at 5.

70. Fletcher, *supra* note 69, at 5.

71. See Simon, *Ideology of Advocacy*, *supra* note 62, at 108.

72. See Fletcher, *supra* note 69, at 16-17.

73. See Simon, *Ideology of Advocacy*, *supra* note 62, at 108-09.

74. See Shaffer & Cochran, *supra* note 62, at 45 (quoting Robert N. Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* 115 (1985)).

75. See Fletcher, *supra* note 69, at 15 (referring to Martin Buber’s and Immanuel Kant’s formulations); Simon, *Ideology of Advocacy*, *supra* note 62, at 108 (referring to Aristotle’s formulation).

76. Fletcher, *supra* note 69, at 25.

77. See Ashe, *supra* note 59, at 2542 & n.20 (pointing out Fried’s own admission that there is a lack of reciprocity in the lawyer-client relationship, and raising the question of whether a lawyer’s zealous representation of the client’s position may enforce client victimization rather than foster friendship between the lawyer and the client).

friend.<sup>78</sup> Thus, even the security of friendship is defined by the threat of the stranger, the outsider.

- Similarly, in the modern mind at least, loyalty is also a threat to *stability* and to *integrity*. If my highest calling is as an autonomous ethical person who will choose the right no matter what my relations think, as Lawrence Kohlberg and others have posited,<sup>79</sup> loyalty to the other throws me into ethical chaos, for I am always making decisions contextually and responsively to his wishes, rather than according to what my moral judgment would declare is right-making in all similar circumstances, regardless of who is involved.<sup>80</sup>
- More importantly for modern and post-modern ethicists, loyalty is *exclusive*: So long as human beings need complex relationships with others to engender loyalty, their ability to be loyal will be limited to a small number of persons, groups or causes. The principle of equal respect for persons then becomes an impossible ideal for any acting subject.
- Even within the small universe of possible partiality, it is difficult to discern a principle of *justice* that explains our choice of friends. Contrary to modern notions of justice, with its emphasis on impartiality and universal moral norms, friendship seems only loosely related to merit or desert, described in any way. While the relationship between an individual's talents and virtues and her ability to inspire loyalty is equivocal, at best, it is not controversial to suggest that our friendship and loyalty does not seem to be allocated on the basis of merit, however defined. As the political history of the twentieth century tells us only too well, thoroughly evil human beings have inspired great loyalty, even self-sacrifice. We like to think that we choose our loyalties based on the merit of the person or cause, but, in fact, so many of our relationships of partiality are thrust upon us by circumstance, time, or necessity. The sense that we are meritocratic is at least partially illusory.

Similarly, loyalty or friendship is only rarely allocated according to need, the opposing principle of modern justice. When a friendship, marriage, or relational community transcends class lines and other difficult boundaries, we remark, because it is exceptional. Yet, if plurality and equality are indeed critical social-values, it would seem

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78. Fletcher, *supra* note 69, at 8.

79. See Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development 18-22 (1982).

80. Rosenberg suggests a partial resolution of this conflict by placing greater importance on chosen rather than inherited loyalties, thus respecting people's individual autonomy, though not resolving all conflicts between loyalty and impartiality. Rosenberg, *supra* note 69, at 726, 738. He notes that Levinson's proposal that people be assigned evidentiary "privilege tickets" similarly prefers self-chosen relationships. See *id.* at 728-29. By contrast, Rosenberg sees Fletcher as privileging status-based relationships or natural bonds, such as mother-infant ties. See *id.*

counterintuitive to argue that those who are most alike are those who most need each other.

This reality poses a problem for a professional culture weaned on "individualism,' 'impartiality,' and 'equality.'"<sup>81</sup> If friendships threaten violation of such critical legal norms as justice, equal respect, and individual integrity, it is difficult to see why loyalty has the untempered place in the canon of legal ethics that it has come to hold. The most common non-instrumental retort seems to be a weak form of logic: Because we all have partiality relationships, and because beyond a doubt we get good things from them, they must be intrinsically good; thus, loyalty is good, even in the lawyer-client relationship.

But a more critical obstacle to the friendship analogy is that it rarely holds true in modern legal practice, especially in Legal Services work: Aristotle's "higher" form of friendship required continuity and reciprocity, and was rooted in "shared histories" of people who have "eaten salt together." . . . Loyalties crystallize in communal projects and shared life experiences."<sup>82</sup> Yet modern practice, marked by lawyer-shopping, specialization, and the reliance on paper pleadings and discovery, allows little time for the shared experiences required to form a mutual history, or to come to treat each other as partners over time. Legal Services clients, who often live lives radically dissimilar to their lawyers' lives, and who more often present their legal problems as transitory emergencies rather than long-term projects, are particularly unlikely candidates to be "friends" with their lawyers, even if they are "reciprocally wishing each other well and conferring benefits on each other."<sup>83</sup>

### B. *An Ethics of Care*

For those for whom the friendship model is a discomfiting fit, the feminist emphasis on the ethics of care in the practice of law has provided a hopeful alternative. Some of the lawyering practice literature after Carol Gilligan's work, *In A Different Voice*, has adopted her thesis that, while male lawyers and clients instinctively understand ethics through a lens/language of rights, women unwittingly function from an ethics of care.<sup>84</sup> While the storm over whether these preferences are

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81. Fletcher, *supra* note 69, at 11; see Rosenberg, *supra* note 69, at 718-20 (arguing that both utilitarianism and liberalism can justify the value of loyalty, the latter justifying loyalties as a means to advance fundamental equalities). Fletcher, in fact, qualifies the cases in which partiality, rather than justice, is appropriate, arguing that there are higher and lower loyalties, and that in some social institutions, "universal and impartial principles" should prevail. Fletcher, *supra* note 69, at 154-55, 162-65.

82. Fletcher, *supra* note 69, at 7.

83. *Id.*

84. See, e.g., Mary Jeanne Larrabee, *Gender and Moral Development: A Challenge for Feminist Theory*, in *An Ethic of Care: Feminist and Interdisciplinary Perspectives* 3, 5 (Mary Jeanne Larrabee ed., 1993) (stating that Gilligan's work

biologically determined has largely subsided,<sup>85</sup> one current of the lawyering ethics stream has followed out the normative implications of Gilligan's work, suggesting that the practice of law would be better if at least some lawyers, some of the time, practiced with an "ethics of care."<sup>86</sup>

An ethics of care, its proponents have alleged, would change lawyering practice for the better in a number of ways:

- (1) lawyers would function out of connection, perhaps even empathy, with their clients instead of from a position of detachment;<sup>87</sup>
- (2) the lawyer's task primarily would be to create and sustain similar responsive connections, with adversaries and others;<sup>88</sup>
- (3) the lawyer's work would be chosen on the basis of others' needs and on avoiding pain for all, rather than on the lawyer's own preferences or on a priority of rights;<sup>89</sup> and
- (4) the lawyer's tactics and strategies would mirror responsibility for others who are involved as well as her client, contrary to the adversarial ethic which suggests that anyone but the client is outside the lawyer's frame of responsible action, except as the rules prohibit certain behavior.<sup>90</sup>

Perhaps most important from an ethical process perspective, the ethics of care intuitively reintegrates the subjective and objective, the motive and the act, repudiating a utilitarian focus on the outcomes of

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"trumpets aspects of women's experience found defective, deficient, or undervalued by the broader culture").

85. See Owen Flanagan & Kathryn Jackson, *Justice, Care, and Gender: The Kohlberg-Gilligan Debate Revisited*, in *An Ethic of Care: Feminist and Interdisciplinary Perspectives*, *supra* note 84, at 69, 71 (discussing that research suggests that women and men distribute themselves bimodally on a justice-care scale); Catherine G. Greeno & Eleanor E. Maccoby, *How Different Is the "Different Voice"?*, in *An Ethic of Care: Feminist and Interdisciplinary Perspectives*, *supra* note 84, at 193, 194-95 (noting that studies show no differences in adult male-female scores on the Kohlberg scale, but do show educational differences); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 Va. J. Soc. Pol'y & L. 75, 81-82 (1994) [hereinafter Menkel-Meadow, *Portia Redux*] (stating that girls and boys show the ability to shift between rights and care ethics, though they may start with a particular "default" focus).

86. See Larrabee, *supra* note 84, at 4; Shaffer & Cochran, *supra* note 62, at 75.

87. See Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 Geo. L.J. 2665, 2668 (1993); see also Zwier & Hamric, *supra* note 65, at 386-87 (defining care as "apprehend[ing] the other's reality, feeling what he feels as nearly as possible," which is a way of describing empathy (footnote omitted)).

88. See Zwier & Hamric, *supra* note 65, at 384-87.

89. See Ellman, *supra* note 87, at 2685; Menkel-Meadow, *Portia Redux*, *supra* note 85, at 78-80.

90. See, e.g., Ashe, *supra* note 59, at 2555 (castigating the lawyer-as-friend model for disregarding injuries to third persons, such as the child of an abusive or neglectful mother, and offering little opportunity for the family). The care model even makes it possible to conceive of client autonomy as a different duty, i.e., not simply non-interference with the client's decisions, as Fried would have it, but as the responsibility to cooperate and assist clients in "mak[ing] rational judgments about their own lives, choices, and interests." Pellegrino, *supra* note 64, at 48-49.

action or a deontological concern for the right act without concern for motivation. Thus, the ethics of care in some sense marries the religious concept of altruism, an "unselfish regard for the welfare of others"<sup>91</sup> or the willingness to sacrifice oneself for the other, with the "cognitive and affective"<sup>92</sup> response of sympathy or even empathy.<sup>93</sup>

The ethics of care also speaks to many tenets of post-modernism: It is "subjective, particularistic and contextual and emphasizes responsiveness and responsibility in relationships with others. It values relationships and connectedness over autonomy . . . [and over] impartial application of abstract, universal principles [including] . . . individual rights and equality in making moral judgments."<sup>94</sup> At the same time, the ethics of care attempts to avoid putting the lawyer in the position of "expert problem solver,"<sup>95</sup> reducing the client to a problem and potentially "imping[ing] on the client's autonomy."<sup>96</sup> Thus, the ethics of care imagines interdependence in decision-making, demanding "a true understanding of, and reflection upon, the feelings of others and yet it does not designate to one individual or another the moral responsibility for the decision,"<sup>97</sup> a dynamic that sounds much like post-modern communicative ethics.<sup>98</sup> The value of open-minded listening to the client, the key to post-modern narrative ethics, is implied,<sup>99</sup> as is the value of reciprocity understood as mutuality based on need.<sup>100</sup>

The ethics of care raises its own problems as applied to Legal Services practice, however. First, as Gilligan and legal ethicists shift their focus to the subject's need to include herself as an object of care, the ethics of care may turn out to be nothing more than a warmer-and-

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91. Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering*, 8 Ga. St. U. L. Rev. 385, 389 (1992) (citing Lauren Wispé, *Toward an Integration, in Altruism, Sympathy and Helping* (1978)). Carrie Menkel-Meadow attributes the term, and this definition, of altruism to nineteenth century sociologist August Comte. See *id.* at 388-89.

92. *Id.* at 389.

93. See *id.* at 389-90. Menkel-Meadow defines empathy as a form of understanding that includes both cognitive and affective bases of knowing but does not necessarily give rise to acts or behavior[ ]. . . .

Not all empathy (care and concern for the other) will lead to action (altruism), yet some emotional correlate such as empathy, may be associated with an altruistic act.

*Id.* at 389.

94. Zwier & Hamric, *supra* note 65, at 387 (footnotes omitted); see Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 Berkeley Women's L.J. 39, 43-44, 48 (1985) [hereinafter Menkel-Meadow, *Portia*].

95. Zwier & Hamric, *supra* note 65, at 388.

96. *Id.*; see also Menkel-Meadow, *Portia*, *supra* note 94, at 55 (positing that female attorneys emphasize more collective and interpersonal aspects of lawyering).

97. Zwier & Hamric, *supra* note 65, at 402.

98. Compare Kupfer, *supra* note 48, at 86-90 (focusing on the necessary elements of intersubjective communication, reciprocity, justification by reasons, consensus, and reflexivity in communicative ethics), with Zwier & Hamric, *supra* note 65, at 400-03 (highlighting a more "holistic" and "particularistic" approach in giving legal counsel).

99. See Zwier & Hamric, *supra* note 65, at 410.

100. See Menkel-Meadow, *Portia*, *supra* note 94, at 62.



fuzzier version of Charles Fried's "lawyer-as-friend" analysis, in which the subject/lawyer chooses the objects of his care, and comes to be obligated by choice rather than need. Consider some of Stephen Ellmann's arguments against the rights ethicist's claim that care ethicists should care for all people equally. While Ellmann suggests many ways in which an ethics of care might make law practice different, such as eliminating moral detachment and reintroducing emotion and concern for the client into decision making,<sup>101</sup> he also makes claims such as the following:

[T]he notion of equal care for all is psychologically implausible. Ordinary people, women and men, do not feel equal care for all. . . . On the contrary, we care for our family and for our friends more than we care for strangers and those whom we dislike, to say nothing of our enemies. . . .

. . . .  
 . . . [C]aring lawyers, like other caring people, need not care equally for all involved in any given situation. . . . If responsibilities are derived from care, and if care is greater towards some than toward others, then caring people have greater responsibilities towards some than towards others. . . .

. . . [T]he ethic of care recognizes the lawyer herself as a proper object of her own care, and thus permits her to take or reject cases when, if her own interests were ignored, care would call for a different course of action. . . .

Important as it is, though, client need is not the only criterion on which caring lawyers should choose their clients. We do not always care for those who need us; sometimes we find their need frightening or simply unappealing.<sup>102</sup>

Such arguments, particularly the last, may reduce "care" to a call to respond to our emotional attachments to people (or lack thereof); to use our loyalties, most particularly our loyalty to ourselves, as a basis on which to act as moral persons. They re-introduce the problem of partiality, because the lawyer and her nearest and dearest are appropriately the subjects of more and better care. Additionally, they re-introduce the possibility that those who are strange to us or our enemies will be excluded from our care.

In fact, so interpreted, the ethics of care re-introduces the notion that responsibility results from autonomous (and only slightly constrained) choice and action upon which others then legitimately rely, even when the lawyer's choices are in response to the other's need:

The lawyer *who decides* to represent a client may be unable to avoid such client need [for emotional sustenance and legal aid] . . . for *she will acknowledge* a responsibility to meet needs that she has helped to generate . . . . Like Charles Fried's "lawyer as friend," the "law-

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101. See Ellmann, *supra* note 87, at 2668-70.

102. *Id.* at 2681-82, 2687.

yer as caregiver," on this account, acts morally no matter *whom she chooses* to support with her representation and her care.<sup>103</sup>

If this account is pushed far enough, the ethics of care may deteriorate into just a call for lawyers to become more sensitive to clients' needs for personal support, and consider more seriously whether they are willing and able to meet those needs, something that could be expected even under a "rights" regime.

Conversely, to take an ethics of care as a more serious and absolute demand is to present the Legal Services lawyer with the same problem that Gilligan highlighted: The sea of need is so vast, and the lawyer's boat is so small. If the Legal Services lawyer takes seriously the real need of the client as defined by the client, and understands the client as every person who walks in the door, the argument goes, he or she will be destroyed and no good to anyone. Indeed, the sheer weight of the need presented by just one client family, if seen in all its fullness as described by the client, would paralyze a sensitive care ethicist. Yet, it is inconsistent with the practice, as well as the theory of care ethics, for the lawyer to start from herself in the ethical equation, to consider her own needs and then calculate what is left to serve the need of the client. Conventional care ethicists are, by definition, those whose immediate ethical imaginations see the needs of others first, and only later come to see themselves; whose moral reasoning is triggered by others, not predetermined by their own internal reasoning.<sup>104</sup>

Moreover, a problem with importing care ethics into legal practice wholesale is that not everyone is a care ethicist, by disposition or even by choice. If Gilligan's work suggests anything, it suggests that there are forces beyond the will—whether biological, cultural or other—that powerfully shape the ethical inclination of adult men and women in ways they cannot fully comprehend, much less revise.<sup>105</sup> To suggest that an ethics of care is "the" ethics that a Legal Services lawyer must adopt is not only to re-monolithize ethics, but also not to "care" about those who are rights ethicists and to dismiss their difference. This raises the question of whether a care ethics can be internally consis-

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103. *Id.* at 2686 (emphasis added) (footnote omitted). Ellmann here suggests that caring lawyers need not select clients whose "aspirations or personalities themselves embody caring values," an argument for selecting unpopular clients that parallels Fried's. *Id.*

104. See Gilligan, *supra* note 79, at 74 (describing the care ethicist's move from selfishness to self-sacrifice to universalizing the "principle" of care).

105. See *id.* at 2; see also Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 Cal. L. Rev. 61, 76 (1996) (discussing the theory that people do not empathize with those whose plight they considered normal for the sufferers, such as starving Third Worlders, but do empathize with people like themselves who suffer similar unexpected harms); Ellen C. DuBois et al., *Feminist Discourse, Moral Values and the Law—A Conversation*, 34 Buff. L. Rev. 11, 58-59 (1985) (noting Gilligan's argument that most people have both rights and care orientations, though people might focus on justice or care in defining or resolving moral problems, with most men focusing on justice, and women dividing between justice and care).

tent if it does not purport to take seriously the ethical person as a full human being, with a distinct socio-economic background and biology. If the initial Gilligan argument holds that care ethics is a "different" not "better" voice,<sup>106</sup> then rights theories continue to supply some important missing links—the concern for the impartial, the concern for equal treatment and universalizable rules, etc. Thus, important questions of post-modernity are implicated: what is the value of ethical plurality; how do we take seriously the embeddedness of value in concrete human experience?

The literature of moral activism<sup>107</sup> or ethical discretion in lawyering,<sup>108</sup> as represented by theorists like David Luban and William Simon, also implicitly challenges the ethics of care and similar theories on precisely the grounds that they cede the ethical ground entirely to the client. While these "rights" ethics of Luban and Simon might betray post-modernism by re-imagining ethical decisions as requiring a moral choice between individual freedom and collective needs, or the atomistic self and an abstract ideal of justice, they do re-introduce the lawyer as both a moral agent and the object of moral concern. The lawyer's reappearance is not purchased either by ceding the lawyer unfettered discretion based largely on self-interest or instinct, as in Fried's formulation (though that may be subject to some debate where poor clients are concerned),<sup>109</sup> or basing decisions largely on the lawyer's loose sense of "care," as in Ellmann's view.<sup>110</sup> Of course, one might easily argue that Luban's "morality" or Simon's "justice" are similarly open to self-justification and distorted interpretation. They might respond, however, that at least there is an external tradition of moral or legal argument which can check such tendencies, unlike care

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106. Dubois et al., *supra* note 105, at 58 (stating that Gilligan argues that gender is physiological/biological, psychological, and cultural).

107. Luban defines moral activism as "a vision of law practice in which the lawyer who disagrees with the morality or justice of a client's ends does not simply terminate the relationship, but tries to influence the client for the better." Luban, *supra* note 54, at 160.

108. Simon argues that lawyers "should have [the] ethical discretion to refuse to assist in the pursuit of legally permissible courses of action and in the assertion of potentially enforceable legal claims." Simon, *Ethical Discretion*, *supra* note 53, at 1083. He further argues that "reflective judgment" should be used to decide "whether assisting the client would further justice." *Id.*

109. Paul R. Tremblay, for instance, has argued that Luban's moral activist model might be problematical in a poverty practice setting, where the private practice incentives to minimize client overreaching and betrayal are not sufficiently countered by the lawyer's ideological zeal; while Simon's "purposivist" model might result in conservative poverty-lawyering, and his "justice" approach might counsel for a traditional non-accountability approach by the lawyer. See Paul R. Tremblay, *Practiced Moral Activism*, 8 St. Thomas L. Rev. 9, 53-64 (1995).

110. See Ellman, *supra* note 87, at 2677-79. But see Zwier & Hamric, *supra* note 65, at 388 (arguing that the care perspective protects against either the lawyer's impingement on the client's autonomy, or the client, as autonomous rights-seeker, impinging on the lawyer's moral integrity).

ethics where the analysis of what is the caring thing to do rests entirely in the actors' intuition.

Perhaps the most potentially destructive charge against the ethics of care (from a post-modern perspective, at least) is its possible erasure of alterity under the guise that it most respects the Other's otherness compared to other ethical systems. For post-modernity, the greatest sin of modern ethical systems is that they totalize and efface the Other by enfolding the ethical relation within the confines of the subject's desires or within a constricting ideal. Put more simply, post-moderns are trying to avoid the recurrence of modern thought, where the Other and the Other's needs are still defined from the self's (or an abstract) point of view, leading to a blanching or distortion at best (and negation at worst) of the Other's otherness. Thus, a lawyer seeking to empathize with his client, trying to learn the history of the other so that he can "identify," may confine her subjectivity into his self-constructed categories or "essentialize" her to the point that she is more like him than she wishes to be.<sup>111</sup> Alternately, the claim of empathy may pretend to nonjudgmental understanding, neutrality, or objectivity in a lawyer's approach to clients, while masking the lawyer's silent constructions of good and bad moral character,<sup>112</sup> like those young Simon made. Furthermore, care ethicists may use the category of empathy to exclude people who are not "ourselves or our kind," or use its power to recreate hierarchical systems.<sup>113</sup> One might argue, what is the point of moving to care, if it does exactly the same damaging work that rights analysis is being criticized for?

Indeed, a move to care might be even more dangerous than a rights ethic, if the care ethicist deludes herself about what she is doing. Ellmann is fairly explicit about returning control of the ethical decision back to the lawyer. As Gilligan points out in her work, however, care ethicists can often be mistaken about when they are acting in the interests of self or other, particularly when they frame their response only around feelings of empathy, i.e., "understanding the experiences, behavior and feelings of others as they experience them."<sup>114</sup> For example, if the mother is the clearest metaphor for an ethics of care, we must admit that the metaphor exists in both good and distorted forms. Mothers do substitute their judgment for their children under the guise of "caring" for them. Mothers do utilize their sacrifices as a weapon against their children or as a tool to ensure that their children conform to their hopes and dreams. They do imagine that their self-

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111. See Delgado, *supra* note 105, at 70; Lucie E. White, *Seeking "... The Faces of Otherness ...": A Response to Professors Sarat, Felstiner, and Cahn*, 77 Cornell L. Rev. 1499, 1508 (1992) [hereinafter White, *Seeking*].

112. See Alfieri, *Impoverished Practices*, *supra* note 6, at 2613-14.

113. Delgado, *supra* note 105, at 68, 73-74.

114. Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 Harv. L. Rev. 1239, 1271-72 (1993) (quoting David Binder et al., *Lawyers as Counselors: A Client Centered Approach* 40 (1991)).

interest is always consistent with that of their children. Then again, mothers also do not: it depends on the mother, it depends on the day.

### C. *Dialogical Praxis*

Beyond care ethics, recent poverty law ethics have also centered ethical attention upon the "process" values of the ethical relation, the ways in which lawyers interact with clients on a daily basis, rather than any particular ethical decisions to be made or virtues of the lawyer manifested in the relationship. Elizabeth Schneider describes such a model as a dialectical process moving between personal concrete experience and larger group experience, connecting and opposing dualities, with theory and experience mutually shaping each other.<sup>115</sup> Central to this process is dialogical rationality which permits practical deliberation over both outcomes and criteria that are important to judgments.<sup>116</sup>

This dialogical praxis model proceeds from the assumption that perhaps the worst thing the legal system does to the poor is to exclude them from its protection by either distorting their stories or silencing them while pretending to listen.<sup>117</sup> Alfieri, for example, argues that lawyers commit interpretive violence on their clients in several ways. First, the lawyer deduces that the client is inferior because he is dependent, so she excludes clients from legal discussions such as negotiations and arguments, and refuses to see the power in the client's true narrative.<sup>118</sup> Second, the lawyer objectifies the client, treating him as "a thing to be handled, manipulated, and remolded" in her narra-

115. See Handler, *Political Spectacle*, *supra* note 9, at 962 (citing Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. Rev. 589, 599 (1986)). Even while many dialogical praxis ethicists disagree about a range of issues from the validity of client narrative as a way of making strategic decisions to the place of rights, most of them share the belief that law is a form of social construction or theory of reality. See *id.* at 958-59, 968; see also David E. Van Zandt, *The Relevance of Social Theory to Legal Theory*, 83 Nw. U. L. Rev. 10, 26 (1989) (defining social theory as the articulation of a model of social life and application to observed social behavior).

116. See Kupfer, *supra* note 48, at 87 (quoting Richard Bernstein's description of the communicative ethics presented in the theories of Jürgen Habermas, Hans-Georg Gadamer, Hannah Arendt, John Dewey, and Richard Rorty). Dialogue is expected to include all affected parties, and a commitment by all parties to consider the legitimate needs of those affected. It permits each individual to be "'decentered' by being forced to look at the problem from alternative points of view" and assumes that the solution cannot be found by one party alone. Kimberly E. O'Leary, *Dialogue, Perspective and Point of View as Lawyering Method: A New Approach to Evaluating Anti-Crime Measures in Subsidized Housing*, 49 Wash. U. J. Urb. & Contemp. L. 133, 168 (1996) (footnote omitted).

117. See, e.g., Bezdek, *supra* note 4, at 577 (arguing that in housing court, tenants choose strategies of silence, including nonappearance, powerless speech, powered speech constrained by what the law permits to be said, and empowered speech where their strategy coincides with the legal forum's possibilities).

118. See Alfieri, *Reconstructive Poverty*, *supra* note 5, at 2127.

tive.<sup>119</sup> Third, the lawyer requires the client to “obey” the lawyer’s narrative and advocacy strategy, rejecting any conflicting alternatives as implausible, and forcing the client into silence, all the while theorizing that such silence is free and rational rather than coerced.<sup>120</sup>

As an antidote to such oppression, dialogical praxis seeks to release individuals from the chains of idealism and history while keeping them closely tied to their communities. Because dialogical praxis focuses on active leadership by clients, they participate as colleagues in framing the world in which their problem is located, describing in their own voices what values and history should determine how that world will be revised in the course of representation, and co-making strategic decisions about how best to achieve their objectives.<sup>121</sup> This model rejects earlier arguments that poverty clients are largely unable to take up their own causes in a sensible and strong way.<sup>122</sup> At the same time, lawyers learn from clients how to criticize their own participation in their client’s subordination, in part by playing the role of their clients, a practice that discourse ethics calls “[c]ritical reflexivity.”<sup>123</sup>

Dialogical praxis exemplifies many post-modern virtues. It abandons universality in the form of abstract justice for a practically and historically located practice: Thinking is in service of doing, and thinking starts with the here-and-now, not someone’s grand idea.<sup>124</sup> Yet, as at least some dialogical praxis theorists like Gerald López claim, such problem-solving does not abandon theory, which is as necessary to rebellious lawyers as “close observation and sensible strategies, [because it is vital to] an ability to maintain a long-range goal . . . while working toward the incremental accomplishment of less obviously radical tasks.”<sup>125</sup> Rather, theory is reconceptualized by Lucie White as reflexive praxis, i.e., a situated collective practice of poor communities and their “allies” involving “slow learning that comes

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119. *Id.* at 2128.

120. *See id.* at 2129. Handler similarly identifies the three faces of power as the ability to get another to do what the subject wants him to do by direct coercion, the power to exclude participants and issues altogether, and the grounds of verbal exchange acting as domination in setting the agenda and deciding the outcome. Handler, *Search for Community*, *supra* note 6, at 21-23.

121. *See* Alfieri, *Reconstructive Poverty*, *supra* note 5, at 2136-37, 2140-45.

122. *See* Hazard, *supra* note 1, at 243 (arguing that the poor are unorganized, “politically unsophisticated, inadequately financed for political warfare, and not patient enough to persevere” in legislative reform).

123. Kupfer, *supra* note 48, at 89.

124. *See* Blasi, *supra* note 13, at 1093 (arguing for Lucie White’s “situated theoretical practice,” a collective practice including theory as a habit of practitioners’ conversation about how to describe problems and strategies and act upon them).

125. Gerald P. López, *Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice* 65 (1992) [hereinafter López, *Rebellious Lawyering*].

from multiple, partial perspectives, from uncertain readings by advocates of their own day to day work."<sup>126</sup>

Dialogical praxis abandons the illusion of reciprocity in Charles Fried's model for a practical demand that reciprocity be instantiated in every day's practice. The best way for reciprocity to be re-created, however, is a matter of some debate. Some post-modern theorists imply that lawyers should back off the meaning-making task, falling silent enough to ensure that the client can give her own story, whether in the confines of the lawyer's office or in the courtroom. Others imagine a more active lawyering role: Clark Cunningham, for instance, uses the metaphor of translation to suggest the co-creation of the client's story. Borrowing from James Boyd White, Cunningham notes that lawyer translation:

recognizes the other—the composer of the original text—as a center of meaning apart from oneself. It requires one to discover both the value of the other's language and the limits of one's own. Good translation thus proceeds not by motives of dominance or acquisition, but by respect. It is a word for a set of practices by which we learn to live with difference . . . [and] a way of being oneself in relation to another being . . .<sup>127</sup>

Thus, the lawyer would be fixed on interpreting the "text" the client creates, which would "never be treated as naive, disorganized, or ill-informed, mere raw material needing the attorney's sophisticated expertise to give it shape and significance. Rather, the lawyer would assume that the client's account had its own inherent order and complex interlocking meanings worthy of rapt and disciplined attention."<sup>128</sup>

126. Lucie White, *Paradox, Piece-Work, and Patience*, 43 Hastings L.J. 853, 854 (1992) [hereinafter White, *Paradox*].

127. Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 Cornell L. Rev. 1298, 1336 (1992) [hereinafter Cunningham, *Lawyer as Translator*] (quoting James Boyd White, *Justice as Translation* 257 (1990)); see also Clark D. Cunningham, *A Tale of Two Clients: Thinking about Law as Language*, 87 Mich. L. Rev. 2459, 2482 (1989) (arguing that client representation is a series of dialogues between legal actors, each replicating "the internal mental dynamic between experience and knowledge in which language both constitutes concepts out of experience and reconstitutes experience by [the] use of concepts"). This move, of course, results in the further question about what kind of "research" a lawyer should be doing on a client, and to what extent the lawyer should be doing "empowerment research" that involves the subjects in how the lawyer would look at their text and for what reason. See, e.g., Clark D. Cunningham & Bonnie S. McElhinny, *Taking It to the Streets: Putting Discourse Analysis to the Service of a Public Defender's Office*, 2 Clinical L. Rev. 285, 298-301 (1995) (describing ethical debates of socio-linguists studying lawyer-client relationships).

128. Cunningham, *Lawyer as Translator*, *supra* note 127, at 1348-49; see also López, *Rebellious Lawyering*, *supra* note 125, at 65-66 (arguing that theory is an instrument of practical problem solving); Alfieri, *Reconstructive Poverty*, *supra* note 5, at 2121 (describing poverty lawyers as "an interpretive community forging a practical knowledge and a discourse to construct the meanings and images of the client world" and "direct and justify the lawyer's actions").

Such practice abandons middle-class lawyers' "caring" delusion that they can fully understand their client's problems and describe them accurately in the language of the law, a language which shuts out as much as it conveys. Rather, dialogical praxis demands that lawyers act to help and partner with clients in describing stories and problems and seeking solutions.<sup>129</sup>

Dialogical practice also mimics post-modern thought's more positive view of power. At least some post-modernism regards power not as "a tool" but as "an evanescent fluid, [that] takes unpredictable shapes . . . 'continually enacted and re-enacted, constituted and re-constituted . . . taken and lost . . . present and absent.'"<sup>130</sup> Power is thus freed for the poor and others, exploding the "dichotomized world of domination and subordination"<sup>131</sup> and the virtually absolute hegemony of the dominant class.<sup>132</sup> Lucie White argues that lawyers can assist in making that possible by seeking protections for their clients against retaliation for speaking out, challenging negative cultural imagery of subordinated classes, permitting their narrative styles to be considered relevant, and dismantling other bureaucratic barriers to participation.<sup>133</sup>

The freeing of the meaning of power is, however, paradoxical, because at the same time the poor are claimed to be in a new relationship to power, the heaviness of existing power-structures over the lives of the poor is even more apparent in the dialogical praxis literature, counterweighing any hope. Even worse, allies of the poor, including their lawyers, are joined on the side of oppression.<sup>134</sup> As perhaps the most telling example, post-modernism recognizes that the construction of subordination and inferiority is embedded not just in the practices of our culture, but in its language, images, and norms, stymying subordinated people from deploying rituals such as the legal system that society touts as available for the protection of their concerns and voices.<sup>135</sup>

The embeddedness of subordination in communication "can lead disfavored groups to deploy verbal strategies that mark their speech

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129. See Trubek, *Lawyering*, *supra* note 4, at 987-88.

130. White, *Seeking*, *supra* note 111, at 1501-02 (quoting William F.L. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 Cornell L. Rev. 1445, 1454, 1496 (1992)).

131. *Id.* at 1503.

132. See Gerald P. López, *An Aversion to Clients: Loving Humanity and Hating Human Beings*, 31 Harv. C.R.-C.L. L. Rev. 315, 319 (1996) [hereinafter López, *Aversion*]; White, *Seeking*, *supra* note 111, at 1503. While this is the ideal argued for, we must take more seriously poor people's own perceptions that they are dominated, "enclosed by the power of the welfare apparatus and yet dependent on it," where rules are a series of "they say" and they are excluded from law's interpretive community. Bezdek, *supra* note 4, at 590-91.

133. See White, *Mrs. G.*, *supra* note 4, at 53-58.

134. See Alfieri, *Impoverished Practices*, *supra* note 6, at 2661-62.

135. See Bezdek, *supra* note 4, at 567-600.



as deviant"<sup>136</sup> or, alternatively, discourage them from employing their own strategies that might indeed be more effective than those chosen by their erstwhile allies, as Mrs. G.'s case illustrates.<sup>137</sup> In some cases, they are forced to speak in the voice of others to avoid even physical harm, for not to obey speech conventions threatens those who have the power of violence.<sup>138</sup> The pervasiveness of images of subordination may make the poor unavoidably complicit in their own subordination, for they internalize and live out expectations placed upon them.<sup>139</sup> Rare moments of evasion, such as Mrs. G.'s insistence on talking about why her daughter's Sunday shoes were important, are the exception.

The dialogical praxis model, however, has spawned its own critique. Some critics have taken on the arguments for emphasizing the almost hopeless weight of dominators' power, for example, in claims that "[w]omen cannot afford to speak with candor—or even to *perceive* what it is that they really feel—because the threat of male violence has taught them to shape what they say by the way in which they read male pleasure, if they want to survive."<sup>140</sup> William H. Simon critiques post-modernism for its "'tendency to see all constraint as power and all power as oppressive' [when, in fact,] . . . constraint is necessary to achieve collective action and that collective action is a necessary element of effective political struggle."<sup>141</sup>

Others suggest that equating lawyers' violations with violence, as Anthony Alfieri does,<sup>142</sup> and suggesting that poverty lawyers are complicit in dominators' oppression, will discourage lawyers from attempt-

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136. White, *Mrs. G.*, *supra* note 4, at 4; see also Alfieri, *Reconstructive Poverty*, *supra* note 5, at 2124-25 (describing lawyers' interaction with clients as silencing, assigning the client's story a category of value, objectifying the client as dependent, and calculating what client role performance will work the best); Bezdek, *supra* note 4, at 571 (describing a judge rejecting tenants' notice of housing defects as statutorily inadequate); *id.* at 584-85 (stating that judges ignore the "polite" style of speech used by women and the poor); *id.* at 593-94 (claiming that judges misinterpret the confrontational style of blacks as hostility rather than self-expression).

137. See White, *Mrs. G.*, *supra* note 4, at 51-52.

138. See *id.* at 8; White, *Paradox*, *supra* note 126, at 857-58 (discussing the effect of retaliatory violence such as lynchings, rape, battery, firings, evictions, or termination of welfare claims of speaking clients).

139. See Handler, *Search for Community*, *supra* note 6, at 26-28 (describing the self-blame of victims); Delgado, *supra* note 105, at 69, 71. In conversation with Delgado, Rodrigo posits that people who move back and forth between communities can betray the least powerful by disclosing their secrets. See Delgado, *supra* note 105, at 73.

140. White, *Mrs. G.*, *supra* note 4, at 8 (footnote omitted).

141. Steven L. Winter, *Cursing the Darkness*, 48 U. Miami L. Rev. 1115, 1125 (1994) (quoting William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. Miami L. Rev. 1099, 1111 (1994)).

142. See, e.g., Alfieri, *Reconstructive Poverty*, *supra* note 5, at 2118 (studying the interpretive struggle between lawyer and client).

ing reform.<sup>143</sup> Ethicists object that the model makes lawyers the villains and romanticizes clients, "ignoring or denying all of these 'dark secrets' about clients [and] client communities."<sup>144</sup> Even Lucie White suggests that a heavy emphasis on lawyers' "interpretive violence" may shift lawyers' attention away from "real" violence in poor communities.<sup>145</sup> Finally, Blasi criticizes the turn away from theory to narrative in dialogical praxis, arguing that theory "helps us to see order and meaning in what otherwise would seem to be random and meaningless noise" and "provides a framework that structures our understanding of individual experience and of collective history."<sup>146</sup>

Indeed, insofar as the attack of dialogical praxis is against lawyers, we must be struck with the shame and confusion expressed by the lawyers in some of the narratives that give rise to the dialogical critique. Shame is part of the tone, because their stories are largely confessional: The lawyers who violate clients are the speaking ethicists themselves. Confusion is pervasive because these lawyer-ethicists simply do not understand their clients, much as they are committed to doing so. In White's tale, that confusion is expressed partly as awe—as mystery at the client's surprising strength when she is permitted to be who she is. In Alfieri's story of the Stranger, it is merely impenetrability; there is no way to understand, even surmise, what the Stranger is trying to tell or why he walks away, even though we have a strong hint of his feelings on the subject of urban renewal.

Thus, even the dialogical praxis model—and arguably, *especially* the dialogical praxis model because of its commitment to hearing the power of the client's own story in the client's own words—is faced with the astonishment of alterity. Even with the best of intentions, the poverty lawyer must acknowledge the client who is so Other that the

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143. Louise Trubek characterizes the debate as having three foci: The critical legal scholarship is too post-modern, i.e., "fragmented, isolated, incapable of duplication, divisive, and pessimistic," to be helpful to practitioners; it is pretentious and inaccessible to all but academics; and it is modest, failing "to chart an ambitious agenda, derived from theory, that would take poor people, as a whole, out of poverty." Trubek, *Lawyering*, *supra* note 4, at 993; *see also* Blasi, *supra* note 13, at 1088-89 (arguing that critical postmodern scholarship has been seen by poverty lawyers as emanating from distant and haughty voices, devaluing the voices of real poverty lawyers; and post-modern scholarship rarely extends beyond the lawyer-client relationship). Yet, neither White nor Alfieri, two lead proponents, seem resigned about poverty-law practice. Alfieri finds in his own failure the possibility for a more realistic approach to representation that recognizes the lawyer's ability to "seize a limited autonomy from the pre-understanding and violence of interpretive practices" and "to extract partial understanding of the client's world from the voices of client narratives." Alfieri, *Reconstructive Poverty*, *supra* note 5, at 2131 (citations omitted).

144. López, *Aversion*, *supra* note 132, at 318.

145. White, *Paradox*, *supra* note 126, at 858.

146. Blasi, *supra* note 13, at 1082. Louise Trubek reports that discussions within the Project Group of the Interuniversity Consortium on Poverty Law have criticized poverty-law scholarship as post-modern, i.e., "fragmented, isolated, incapable of duplication, divisive, and pessimistic" and "not helpful to practitioners." Trubek, *Lawyering*, *supra* note 4, at 993.

lawyer is silenced into a moment beyond imagination, beyond the ability to construct alternative stories which might help the lawyer understand. The lawyer struggles to make sense of the Other's life when it makes no sense. Why did my client do what seems a self-destructive act? Why did she depart from the plan she agreed to? How can she survive in that situation, when I can't imagine surviving, much less accepting it? Why doesn't he feel what I would feel in this circumstance? Why is this so important to her? It would be a hardy lawyer who was not tempted toward despair, toward quitting and taking up another line of work, or affected by a profound sense of meaninglessness in his work, in light of these questions.

Thus, the emotional duality of the post-modern realism seems incapable: On one hand, we hear a hopeful commitment to a reciprocal dialogue that optimistically proposes the possibility of finding the client's voice in the client's own silencing, of turning the corner on lawyer domination. On the other, we are witness to great pessimism and shame about how completely dominating structures are infused into every relation of lawyer and client. The divide between reality and hope is as enormous as with any other relational argument. Indeed, perhaps it is larger in that the dialogical praxis model anticipates the total commitment of the lawyer to the people whom she serves.

### III. LEVINAS AND THE FACE

The story of lawyer violence that White, Alfieri, and others tell is the story of totality or of human diminishment. As Levinas tells it, what it is to be human is to desire the Other, who is necessary for our humanity, and at the same time to desire to destroy what precisely makes him/her the Other—that irreducible difference which cannot be possessed, bounded, or understood by the self.<sup>147</sup> The insight which Levinas contributes to philosophy is his insistence that, at bottom, reality is ethical,<sup>148</sup> overturning modernism's assumption that existence precedes ethics, that we first *are* and then we decide what we will *do* in respect of others. Levinas refutes this basic assumption, claiming that the ethical relation is the definition of reality—what we *are*. In that sense, Levinas accepts the post-modern understanding that the individual cannot possibly be prior to community, for there is no such thing as an individual, there is only the ethical relation. Conversely, Levinas rejects the priority of the community “over” the individual, the extinguishment of the individual for the sake of community, for reality always consists of the Other standing over us, calling for response.<sup>149</sup>

147. See Levinas, *supra* note 10, at 33-34, 39, 49-52, 197-200. The description of Levinas's argument which I give in the next paragraphs can be found in *Totality and Infinity*, *supra* note 10, primarily at 33-52 and 194-204.

148. See *id.* at 197-201.

149. See *id.* at 212-14.

The tales poverty law ethicists tell reflect the anguished ambivalence of desire for the Other and for His destruction. On one hand, poverty lawyers are fully engaged, heart and mind, in the search for justice for their clients, and even more importantly, for moments of relationship, of human touching. They need their clients as much as their clients need them; they desire the "Beloved Community" in their daily work for themselves as much as for their clients. On the other hand, their need to be there for their clients ends up in silenced clients, in reduction of clients to dependence and inferiority, and their construction of a narrative which denies the clients' power. These are tales of good-hearted, perhaps even "loving" attempts to help and simultaneously (unwittingly) to take from alterity what cannot be taken, what escapes being captured. To subdue either of these paradoxically-joined movements, the loving embrace or the dominating diminishment of the client, is to trivialize the poverty lawyer's experience. To hint that there is some praxis that has the power to overcome the duality is to become an idealist.

Unlike the dialogical praxis theorists, Levinas does not locate irreducibility in the client's narrative, or as Cunningham would have it, the client's "text" for which the lawyer is translator. Prior to speaking, there is the face of the Other: The face confronts; it cannot be reduced no matter how much we should strive to reduce it. Imagine trying to describe an encounter with a face that does it justice. We can detail the features of another, analyze a facial expression, but our power to capture the ever-changing nuances of encounter with the face is impoverished. Indeed, though sometimes Levinas almost suggests that the face and speech are one, that they attest to each other,<sup>150</sup> the face is the prior reality:

Language as an exchange of ideas about the world, with the mental reservations it involves . . . presupposes the originality of the face without which . . . it could not commence. If at the bottom of speech there did not subsist this originality of expression, this break with every influence . . . this straightforwardness of the face to face, speech would not surpass the plane of activity.<sup>151</sup>

It is the abruptness of this encounter with the face that confirms its truthfulness: Unlike the narrative, which comes out of time and deliberation, the moment of encounter of the face does not permit construction or analysis. The face is not mediated by either the Other or the self, even though we catch ourselves in the post-encounter trying to interpret, trying to write a concept or narrative suitable to the surprise of the encounter.<sup>152</sup> The face resists interpretation, either in the positive sense that Clark Cunningham describes or in the negative

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150. *See id.* at 201, 213.

151. *Id.* at 202; *see also id.* at 52 ("Contact is already a thematization and a reference to a horizon.").

152. *See id.* at 45-48, 123-25.

sense that Alfieri does. It resists duplication; it is not only unique, but beyond our power to transform into what we wish it to be, even with our best plastic surgery, mimesis, intention. The moment with the face is indeed one of encounter, of meeting the unknown.

Unlike the other three relational models, which work back from a shared experience over a period of time to re-think the moment the dialogical partners first met, trying to see how it might have been reshaped so the long-term relation could have gone better, Levinas's Face is encountered for the first time *each* time. The experience of strangerhood, of finding the other impenetrable, is not the unfortunate exception but the ever-present reality. My father, my spouse, my child, my friend are no less strange to me, no more captured by my impression when I encounter Their Face for the ten-thousandth time than the client applicant I meet for the first time. Even in their familiarity, any moment where they are beyond what I can construct or imagine or feel is every moment in which I encounter Their Face.

The ethics of encounter responds to the problem of outsiderhood, and the question of equal respect, in a very curious way. It refuses the modern question—how can I include the outsider, the client, in my circle of friends or my world—or the care ethics question—how can I efface myself so that the client is inside the circle. Indeed, it rejects the post-modern question, how can we create a circle together, this outsider and I, through dialogue that works? Instead of candidates for a potential circle of intimates, we are always and perennially strangers to each other. The client at my door whom I cannot understand, or the Stranger who turns away from Alfieri, she is the paradigm, the reality, the norm. The person I “know,” the person who is “familiar” to me, whose ways I “understand” and whom I can count on, is the deviance, the imaginary. Indeed, the person I “know” is the person I have violated, for it is I who have reduced the alterity of that Other, that person who is so familiar that I can recite his thoughts and smell when he has been in a room; I have reduced that Other to my own recreation. Thus, none of us are insiders; being “inside” is just an illusion.

The experience of the familiar Other, and even of the Stranger, is certainly more complicated than “not-knowing” the Other. It is not simply an illusion that I believe I know a familiar Other—a loved one, an old client—in the sense that Alfieri describes the lawyer's domination as borne from illusion. But like the double entendre of embrace and diminishment, the simultaneity of knowing and not knowing the familiar Other is always with me. For instance, that I anticipate how a familiar Other might react to what I do or say is both correct and incorrect: The integrity of the Other will reproduce some patterns of thought and behavior and feeling that I can rely on, but never ultimately. When I begin to rely ultimately, to possess scientific-like cer-

tainty that I can know His next move, I am relying on my own recreation, not on the reality of the Other.

Think of two old friends sitting silently in a room. There is a truth in the familiarity each senses, in their trust of what is going on in the room, and yet that truth is such a stripped, colorless version of what is going on precisely because each is Other to the other, as to also say each one's interpretation of the moment amounts to a lie. Similarly, consider a married couple before dinner, him reading the paper, her making the supper, each ruminating about his or her problems of the day: in modern consciousness, each experiences ennui, boredom.

An ethics of encounter attests to the simultaneous security and violation of these moments: Each person, desperately needing stability, some non-new-ness from moment to moment, accepts and trusts the pattern that has been established, each accedes to it. Yet, the act of taking-for-granted suppresses the possibility for surprise, the lost opportunity for intimacy, the option for a new pattern of being together that remakes them both or calls forth their amazingness, suppressed by the routine. Each refuses, in order to preserve his or her own control, to glimpse even the trace of the other.

To bring this back to poverty law practice, the ethics of encounter suggests that the poverty lawyer is unjustified in seeing her first encounter with a client applicant, a Mrs. G., as somehow a defective and incomplete beginning which the lawyer can turn into a meaningful relationship by just spending enough of herself hearing the client speak, "dialoging" with her, being with her. The encounter is the moment *par excellence* where the ethical relation is established, where we are tempted to diminish the Other, where we almost cannot help but diminish the Other because of our own need for order. And each moment thereafter is equally the moment of encounter. Indeed, as Alfieri points out by describing how clients are violated, it is more likely to be the moments after the first encounter, when the lawyer feels confident that he has understood the client enough to act, which are defective and incomplete, for the moment of the lawyer's security is the moment of the client's evisceration. For at best, to refer to Drucilla Cornell's words, in any moment of understanding, the lawyer can see only the remains, can mourn the trace of the Other.<sup>153</sup>

What familiar structures can establish, in that first moment and each thereafter, is not *when* the ethical relation begins, but in the moment of relation, how *much* we are willing to diminish or encapsulate the other for the sake of our own security. The hard truth-telling of poverty lawyer prophets since Bellow and Kettleman is that Legal Services offices have become bureaucracies, routinizing services so that the moment of encounter necessarily treats a new client as a

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153. See Drucilla Cornell, *The Philosophy of the Limit* 72-75 (1992) (using the image of Jacques Derrida).

means, not an end, as an "It" and not a "Thou."<sup>154</sup> For example, the ethical relation is disrupted by the assignment of numbers to waiting people—equating them with assembly parts or commodities; or the rudeness of a secretary who dismisses a client applicant to the streets; or case selection that compares clients' problems to medical triage—asking whose wounds are bleeding most profusely. Some practices will allow us to see The Face a little more clearly than others, even though they are scarier.

Indeed, the practices that many dialogical praxis ethicists condemn can be described in an ethics of encounter as attempts to diminish the client in order to regain one's sense of power and order over the situation. Gerald López, for instance, criticizes regnant lawyers who "'formally represent' others,"<sup>155</sup> limiting their work with clients to those problems that can be solved with traditional legal methods, and indeed set up their offices to facilitate such representation; who ignore how legal change actually impacts the lives of subordinated people; who use adversarial methods to achieve their work, while understanding "community education" and organizing as marginal, uncritical activities that do not reach the core of the problems; who imagine themselves to be "pre-eminent problem-solvers,"<sup>156</sup> not taking the time to make connections to community institutions unless they are useful for the lawyer's work on particular cases, nor examining the wider structural issues which might impact the client's situation; who accept the view that subordination "cyclically recreates itself in certain subcultures, thereby preventing people from helping themselves"<sup>157</sup> unless lawyers assume leadership in fighting such subordination; who imagine themselves as "Lone Ranger" heroes, making "statements through *their* (more than their clients') cases about society's injustices."<sup>158</sup> López's criticisms are finally about diminishing or totalizing others—reducing them to abstractions, reducing their own activity to peripheral and unnecessary, and centralizing the role of the lawyer to the exclusion of a voice or view of the client. They are not necessarily dependent upon a "dialogical" view of lawyering.

The relation with the Other in the ethics of encounter is not the relation of liberalism, although it accepts some of liberalism's realism that an ethics of care (and perhaps dialogical praxis) does not. The ethics of care understands the threat of the Other as the threat of being overwhelmed—the Other may simply need more of me than I have to give, especially considering that there are many Others who need, who demand. From an ethics of care, other than this vast vortex of need, the Other does not threaten me. I can, if you will, trust the

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154. See Alfieri, *Reconstructive Poverty*, *supra* note 5, at 2128-29.

155. López, *Rebellious Lawyering*, *supra* note 125, at 24.

156. *Id.*

157. *Id.*

158. *Id.*

Other. Even the dialogical praxis model assumes that *I* am the threat to the Other: The Other may mystify me, may foil my plans, may expose how truly stupid I am for thinking I understood her and was representing her well; but the Other is no real threat to my person, unless I am so rigid that my identity depends on perfection and I cannot ever admit mistakes in my own construction of reality.

An ethics of rights recognizes that the threat of the Other is much more than a threat to my energies, as the ethics of care suggests, or even my pride as a professional or a person. The Other can annihilate me, the lawyer, not only in the sense of totalizing me into the Other's framework, making me less than I am in His imagination, but also in the sense of murdering me. To the extent an ethics of rights understands a key threat as fusion, the loss of independence, the loss of the conscious self, the Other can threaten that loss by demanding everything from me including my soul. To the extent an ethics of rights describes a fear of physical harm, the literal loss of life, the Other can take that away from me. I can be dead after the encounter with the Other, dead in every way I fear being dead.

Though Levinas wants to claim that the face of the Other is welcoming, that the relation with the Face is peaceful towards me,<sup>159</sup> I would argue that a realistic ethics of encounter does not hide the threat of the Other, assuming that with dialogue, this threat will be removed. It hides neither the care ethicist's fear that I will be overwhelmed, nor the rights ethicist's fear that I will be annihilated as an independent self, as a person. There is a dimension of height to the encounter: The Other looms over me, terrifying me. A realistic ethics of encounter thus accepts that liberalism's obsession with the protection of autonomy has its source in a real threat. The prisoner who leans over the metal prison table in the lawyers' counseling room, whose steel eyes reflect scores of violent acts he has committed and is willing to commit, all for nothing, is the Other. The father who stares at me in denial of the brown, criss-crossing scars on his child's back is the Other. The mother who blithely acknowledges that she has not reported her work income to her welfare caseworker is the Other. The Other stands over me—he *is* out to get me, to demand it all from me. In terms of poverty practice, then, lawyers' sense that their clients constitute a threat—sometimes to their physical lives, surely to their ability to maintain a private life, to their sense of self-worth, to their freedom and energy, to their ability to make meaning out of their

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159. See Levinas, *supra* note 10, at 197. Levinas most often suggests that I have the ability to murder the Other, but the face of the Other only resists me ethically: His "infinity, stronger than murder, already resists us in his face, is his face, is the primordial expression, is the first word: 'you shall not commit murder.'" *Id.* at 199. Yet Levinas agrees that the Other resists my powers to totalize him, which is a threat to me. See *id.* at 198. In the sense that the Other calls us to responsibility, which is who we are, the Other is not threatening. In the sense that the ethical is the real, to lose my life in the exercise of responsibility is not to lose myself.



world and their work—is valid, but only if they cannot see the ethical relation.

Levinas argues there is another dimension to this height. The “height” of the ethical relation is the call to responsibility that the Other makes on me when I look into His face. What I see in the Other is not simply welcome, or threat, but vulnerability, need. (Not, though, the need of the pitiful orphan child who peers out at me from TV, putting me over him in charitable condescension; rather, it is a dreadful need, more difficult than I can say, eliciting in me complex tragic emotions, among them awe, freedom, paralysis, and fear.) I am beholden in that moment; I did not choose to be beholden, and I cannot escape being beholden.<sup>160</sup> It is what I am. In this way, Levinas makes a more radical and—some would say—a more threatening argument than liberalism. For liberalism still posits that we are sufficiently free, sufficiently equal to permit us to withdraw, to choose *against* being beholden, without choosing to be other than ourselves. Liberalism thus accepts the threat of the Other existing in the encounter with the Face, but not the vulnerability of the Other, the need that makes us who we are out of our response, our being responsible.

By contrast, the ethics of care and dialogical praxis model reject the facticity of height, of the Other to me as a poverty lawyer. Sometimes, care or dialogical praxis ethicists imagine a horizontal relationship in which the Other and I are looking eye to eye, same weapons, same vulnerabilities. Or, if they imagine the horizontal as ideal, they misunderstand the difference of height, believing that the lawyer stands over the client. In the ethical relation, the reality of our encounter with the Other, the reverse is true: Mrs. G. towers over Lucie White, even when White perceives herself as in control, thus the confusion, the anger. That is, these ethical theories fail to understand that in the ethical relation, power is created not by dominance and subordination but by vulnerability and need.

The rights ethicist, of course, runs for cover against this threat of the Other against the self. For a rights ethicist, both the Other’s ability to annihilate him and the Other’s claim of need on him are threats from which he can seek refuge in his own personal fall-out shelter. If the liberal must answer to the Other, if he must disrupt what is worthy of his time and attention because the Other breaks in on him, he believes he will be diminished, controlled by the Other. Autonomy is liberalism’s highest value: If I am self-constituted and self-justifying, I cannot be detoured or destroyed by the incessant call of the Other’s need. I can deny what is undeniable: that I *am*, I exist in the ethical relation with the Other.

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160. See *id.* at 199-201, 213, 251. For Levinas, responsibility does not limit but “promotes my freedom, by arousing my goodness.” *Id.* at 200.

The Face, then, subverts the expected rules of interpersonal behavior. Alfieri's encounter with the Stranger is as close to a moment of truth as he may ever get, for it is as close as we can get to an encounter that does not diminish the Other, that recognizes the threat and the call of the Other towering over us as the ethical reality, as who we are.

A normal attorney, faced with this glimpse of the remains, might be expected to react in paralysis or denial. It seems like a situation in which it is impossible to move, for to move is to suppress the Other's alterity in some way, because movement requires the construction of some narrative or abstraction to make sense of the encounter. We should rather stand, awed, afraid, silent, beholding. A lawyer has to act, however; that is what lawyers are good for, even if we define action in the broadest sense, i.e., "to take an initiative, to begin . . . 'to lead' . . . to set something into motion" in a way that will reveal who the actor is, what is unique about him or her as a person.<sup>161</sup>

I confess to being stumped at this point. The deconstructive move, to be satisfied with making clear what is happening between the Other and me, is unsatisfying, for I am a lawyer, an actor, even while I know each small action I take—even the words that come out of my mouth—depends on a mis-translation of my client's text, an apperception of her Face, a suppression of her alterity. So I make a second-best move at this point: to look to the tradition of solidarity to see whether it might provide a second-best possibility for action.

#### IV. THE ETHICS OF SOLIDARITY: FROM SEEING TO ACTING

The ethics of dialogical praxis has contributed a great deal to the discussion about how we do not see our clients, and how we should go about interacting with them, as a "process." Start by discarding arguments about the essential nature of people who are poor, the dialogical ethicists argue, or any preconceptions one might have about the client's or his culture's dependency or helplessness.<sup>162</sup> Start by listening to the whole story, not interrupting the client to sort out what is relevant and not relevant in the language of legal culture. Take seriously the story as a text which may have its own logic, rather than as a rambling set of unrelated sentences. Let the client define what the "problem" is, rather than forcing the narrative into the confines of a legal problem so the lawyer feels empowered to change things for the better. Involve the client in the resolution of the legal problem, not only in those areas traditionally within the client's province, such as the decision whether to litigate or to settle, but also in negotiations, discovery, strategic planning, and other necessary steps that lawyers must accomplish. Treat the client symmetrically: Pull down some of

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161. Hannah Arendt, *The Human Condition* 177 (1958).

162. See Alfieri, *Practicing Community*, *supra* note 43, at 1754.

the same barriers that you have asked her to pull down, communicate with her in the way that she has communicated with you, be vulnerable and flexible as you have asked her to be.

Because the ethics of encounter recognizes the height in the lawyer-client relationship, the way in which the Other stands over me in her threat and her need, such a construction of the "new and improved" lawyer-client relationship carries with it a certain lie, even while it presents some hope for less diminishment of the client. To respond to the realities uncovered by the ethics of encounter, we must search for a second-best language to explain how we act in the face of the Face. I choose the language of solidarity largely for its resonance, its reverberations, as an attempt to explain what is happening between lawyer and client that permits action while not blinding lawyers to the reality of the encounter.

The language of solidarity sounds in history and it sounds in our culture in a plurality of ways (some of which concededly diminish the human experience more than others). But it is a language that does not demand the separation of the poor from others on the basis of incomplete theories of class interest and class struggle. There are others who speak solidarity language, with whom the poor can speak. For example, the Christian church has a history of commitment to solidarity with the poor; and solidarity has been the anthem of the national and international labor movements, the women's movement in the United States, and it even has meanings in politics and in the world of market exchange. Its resonance, then, is to bring together rather than to divide, a dynamic critical to successful change.<sup>163</sup>

Moreover, solidarity is the "pro" to the "con" of resistance or rebellion, key concepts for some dialogical praxis proponents. For instance, López's heroes are those in his community who are "on the ground . . . *rebellious* against all that has oppressed us and our ancestors, all that seems now still likely to subordinate our descendants,"<sup>164</sup> while for Ashe, a key task of the lawyer is to *resist*, especially to resist essentialist constructions of her clients.<sup>165</sup> While it accepts the dynamic strength of the call to resist or rebel, solidarism is not defined exclusively by its "over-againstness" with respect to another's power. Rather, it accepts that power is available widely, even to those who occupy what we commonly think of as the "under" position defined by such terms as subordination and domination. Or as theologian Ada

163. See, e.g., Joseph Erasto Jaramillo, *The Community-Building Project: Racial Justice Through Class Solidarity Within Communities of Color*, 9 La Raza L.J. 195, 233-42 (1996) (arguing the necessity for solidarity among people of color across class lines as a requirement for racial justice and for counteracting the dehumanization of racial insubordination).

164. López, *Rebellious Lawyering*, *supra* note 125, at 7 (emphasis added).

165. See Ashe, *supra* note 59, at 2550-51 (focusing on resistance to the construction and essentializing of the "bad mother" in neglect/abuse cases that reinforces women's roles).

María Isasi-Díaz puts it, solidarity is aimed at “building of community of those who struggle *against* oppression and *for* justice,”<sup>166</sup> recognizing that those two dynamics are different. Thus, solidarity is compatible with Levinas’s understanding of the Face, of the client who stands over us, demanding of us, rather than under us, obeying us. It focuses on the ways in which those in solidarity—different though they may be as a middle-class white lawyer and her indigent minority client—are “for” each other, rather than only on the ways in which they are “against” another.<sup>167</sup>

Solidarity also sounds in the language of here and now. It accepts the critique of post-modernism that we must focus on the contingent, the contextual, the concrete experience of particular peoples in particular places. Solidarity is not a possible abstraction; it is senseless apart from human beings. Yet, it links the individual solitary relationship with the larger issues of groups and people over time.<sup>168</sup> For the poor to be in solidarity means not simply that witnesses will speak in their own voice, but that they will imagine the voices and the acts of those who have preceded them and those who will follow—not abstractions, and not necessarily even heroes, but those who have shed blood and tears on a daily basis, and those who will face new challenges building on those the client faces each day.<sup>169</sup> Without the notion of solidarity, it is impossible for a welfare rights group to wonder why a domestic servant torn from her family by apartheid’s laws in South Africa, or a child sewing soccer balls in Southeast Asia, might be relevant to its own vision and work. It is impossible to imagine individuals, even lawyers, serving as “witnesses to injustice” when nothing more can be

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166. Ada María Isasi-Díaz, *Solidarity*, in *Dictionary of Feminist Theologies* 266, 266 (Letty M. Russell & J. Shannon Clarkson eds., 1996).

167. For instance, people of color can support each other, rather than focusing on class differences such as income, occupation, “cultural capital” necessary to function in middle and upper-class life, and respectability, or class standing. See Jaramillo, *supra* note 163, at 202-03.

168. As one example, the Catholic tradition of solidarity has been linked with the principle of subsidiarity, a social structural principle which says that “it is wrong to transfer ‘to the larger and higher collectivity functions which can be provided for by lesser and subordinate bodies.’” Arthur F. McGovern, *Entitlements and Catholic Social Teachings*, 11 *Notre Dame J.L. Ethics & Pub. Pol’y* 445, 450 (1997) (quoting Pius XI, *Quadragesimo Anno* para. 79 (1931), reprinted in *Catholic Social Thought, The Documentary Heritage* (David J. O’Brien & Thomas A. Shannon eds., 1992)). Such a concept rests on a high valuation of the individual, and of smaller communities which individuals create in solidarity with each other; for this tradition, the energies of society flow from below upwards, not from the top down. See Francis Canavan, *The Popes and the Economy*, 11 *Notre Dame J.L. Ethics & Pub. Pol’y* 429, 440 (1997).

169. Gary Blasi suggests that attention to “larger stories of collective resistance and community building” and the “structures and forces that explain . . . the persistence of individual tragic tales” is necessary to the task of poverty-lawyering, claiming “[c]ommunities, organizations, movements, and lawsuits also have stories to tell, if someone will listen.” Blasi, *supra* note 13, at 1090.

done.<sup>170</sup> Without clients' ability to imagine such links (provided they do not diminish the ways in which stories of struggle are as different as they are alike), the possibility that clients will struggle beyond their preoccupation with their own story rather than totalize others' experience is slimmer. For solidarity recognizes that victims, too, can reduce and diminish the Other, whether it be the lawyer or someone else who is also suffering. Solidarity offers a way out of self-absorption even for victims, if the suffering can find their way to claim it.

At the same time, solidarity, in Christian terms at least, and as it has been used in labor history, has refused to overthrow the conflict between individual and community by resolving it—in favor of individual rights as liberalism has done, or in favor of concrete community interests or some abstract community spirit, as various communitarian and conservative formulations would do. Rather, solidarity recognizes the paradox of the encounter with the Face: We cannot be without the Other, even while the Other is irreducibly other to us, with an alterity that cannot and should not ever be resolved into unity. In the Catholic version, this notion is expressed in the concept that we are in solidarity with others, including the poorest of the poor, all responsible for the common good. The common good is a concept which cannot be separated from the recognition of the intrinsic worth and dignity of each individual.<sup>171</sup> Indeed, solidarity in this tradition has been aligned with a preferential option for the poor, the heeding of the call of those Absolutely Others.

Solidarity gives much of what the other relational ethics I have discussed provide, while perhaps more nearly fitting the Legal Services context of which we are speaking. Like friendship or loyalty, like an ethics of care, solidarity gives *security*, assurance of care, the sense that we can rely on the other in time of our need,<sup>172</sup> when *we* are the Other. In short, it produces the *stability* human beings crave, which is not dependent on individuals' evaluation of other's individual value,

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170. See Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 Harv. C.R.-C.L. L. Rev. 353, 365 (1996) (arguing that death penalty lawyers' narrative advocacy for their clients is not in vain, for they serve as witnesses to injustice in the present and historians memorializing these injustices for the future, which permits them to carry a future vision where justice prevails over violence).

171. Insisting that rights belong to individuals "prior to the state," the Catholic tradition stresses human dignity as the foundation on which rights rest, a foundation which understands "rights from," i.e., freedom rights, as well as "rights to"—the rights to "meeting of basic human needs, and participation in community." McGovern, *supra* note 168, at 447 (footnote omitted).

172. See Jaramillo, *supra* note 163, at 210 (quoting bell hooks's remembrance of her segregated black community as one where black people "were truly caring and supportive of one another" and Ana Castillo's recollection of her Chicago Mexican neighborhood as one where "the spiritual and psychological needs of a people so despised and undesired . . . were met in our own large communities" (footnotes omitted)).

instrumental or intrinsic,<sup>173</sup> but is dependent upon a common vision or purpose. Second, solidarity resounds over time, like loyalty or friendship; it has the possibility of the depth of personal history, without requiring intimacy of those in solidarity as its condition.<sup>174</sup> Third, the *integrity* of the group or movement provides some certainty to the individual that he will not be lost in the sea of autonomy, foundering helplessly, and permits the individual to develop her own integrity in a relationship,<sup>175</sup> as Fletcher argues.

Solidarity also encloses disparate anthropologies underlying opposing economic and social arguments. For instance, even those economists who understand humans as largely self-enclosed and selfish individuals, "born and dying one by one, each suffering his or her own hunger pains and enjoying his or her own full stomach," may agree that the

principles of behavior . . . essential to [human] survival . . . [are] solidarity and reciprocity. . . . [Reciprocity, that is] [g]etting something back for something given neatly releases, or at least reduces, the tension in a creature desiring to be both selfish and social at the same time; and solidarity—a belief in being able to depend on another—permits the projection of reciprocity through time.<sup>176</sup>

Solidarity does more than permit continuing reciprocity and mutual interdependence on an economic and material basis, however. Solidarity recognizes the many levels at which we are present to each other and for each other. It allows individuals to achieve all sorts of other personal goals by joining with those of common interest, and to seek agreement on shared traditions and values. Indeed, sociologists suggest that solidarity makes agreement on shared values more enduring because the group can exercise influence upon its members through moral obligation and some sort of enforcement.<sup>177</sup> Solidarity can also provide people company, a sense of belonging, in a common struggle or endeavor, a feeling of collective identity.<sup>178</sup>

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173. In the Christian tradition, this non-dependence of human dignity on consent is embodied in Pope Leo's articulation of the natural law tradition, which imagines rights as part of an ideal social order intended by God, not any humanly-chosen social contract. See McGovern, *supra* note 168, at 448.

174. See Michael Hechter, *Principles of Group Solidarity* 8-9 (1987).

175. See Fletcher, *supra* note 69, at 34.

176. Ian R. Macneil, *Exchange Revisited: Individual Utility and Social Solidarity*, 96 *Ethics* 567, 568-69 (1986) (citation omitted). Macneil argues that both gifts and other utility-enhancing exchanges contribute to social solidarity. See also Delgado, *supra* note 105, at 94 (showing, through a fictional alter-ego, how empathy is dependent on the ability to trade, which makes it least useful when it is most needed, i.e., when socioeconomic equalities are the greatest).

177. See Jodi Dean, *Solidarity of Strangers: Feminism After Identity Politics* 18 (1996); Hechter, *supra* note 174, at 8-9; Jaramillo, *supra* note 163, at 211.

178. See Dean, *supra* note 177, at 18; Jaramillo, *supra* note 163, at 226 (citing John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back to the Future Essay*, 71 N.C. L. Rev. 1487, 1501 (1993)).

At another level, solidarity permits individuals a certain amount of *distinction or value*, permits them to be recognized as "embodied person[s] with dignity worthy of recognition and response," to affirm that a sole individual "is a person whose integrity, like that of us all, depends on her relationships with others."<sup>179</sup> Without solidarity, groups of people may not have the skill of empathizing with someone who is undergoing a radically different experience. Solidarity permits them to be open to the story of the other, to attempt to imagine what the other is undergoing, and to respond, at least out of the hearer's own imagination, about what he would be going through if he had suffered or rejoiced as the other has.

Yet, a key value to using solidarity language in a discussion about strangers, including lawyers and their clients, is that the intimacy of love or friendship is not necessary for solidarity. Apart from his distortion of friendship, a major difficulty with Fried's formulation<sup>180</sup> is that lawyers and their clients rarely become friends or loved ones, i.e., rarely enter relationships in which individuals are treasured just as they are and a depth of attention to the uniqueness of the other is demanded.<sup>181</sup> Indeed, in Legal Services practice, even the most community-involved lawyers are likely to see most of their clients once or twice at the most, some because they only need advice or the lawyer really cannot do much for them, others because of the transient nature of their own lives and priority of need.

While López's ideal of a community-situated practice cannot be gainsaid, the hard truth is that it is only an ideal; it is unlikely that most poverty lawyers will take up his call to immerse themselves in their communities,<sup>182</sup> some out of choice, others out of necessity. Indeed, even those most devoted to the community cannot fully enter into their client's lives; they can give up their salaries, but most cannot reasonably give up their homes so they understand the plight of the homeless and still function in the legal system; or blind or maim themselves so they truly enter into the world of the disabled. If community immersion is a requirement for poverty practice, the needs of the poor will go unmet, even more than they do today.

Faced with the fact that poverty lawyers and their clients are truly strangers, not only in their inability to hear each other, but also in their physical, economic, and social separation, to use the friendship or care models is probably to tell a dangerous lie. For a lawyer to suggest either explicitly or implicitly that he is the client's friend, or that he "cares" about the client in the intimate sense of that word, is likely to raise expectations that the lawyer is both unwilling and unable to meet. Indeed, it is not possible to meet such expectations even

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179. Dean, *supra* note 177, at 14.

180. See Fried, *supra* note 23, at 1076-78.

181. See *id.* at 17-18.

182. See López, *Rebellious Lawyering*, *supra* note 125, at 28-38.

if the lawyer is willing, in part because the value of relationships of affection depends in part on their specialness, their exclusivity, the fact that they are not limitlessly extended. If I am someone's true friend, I am in a small group of people, and that makes it easier for me to know that my friend's appreciation and solicitude is not only genuine but dependable. To be the friend of every stranger, and hundreds of strangers a month, is to be a friend to no one; and a rare person would value the friendship of another who counted him as one of hundreds whom he similarly befriended.

The lawyer might also be *unable* to befriend or "care" for even a particular client. To the extent that the ethics of care implies a relationship toward the client that integrates feelings, thought and action, the lawyer may not, in Ellmann's formulation,<sup>183</sup> feel "care" towards his client. His client may be so unlikeable as not to generate nurturing or admiring emotional responses by the lawyer. Moreover, the lawyer may have personal emotional limitations that make him incapable of caring for anyone in any real sense of that word. Even if the notion of friendship or care is stripped to cover only the lawyer's acts, part of the power of those acts derives from the fact that they are accompanied with the lawyer's response from the soul, heart, or mind. As with most virtues, which combine action and spirit, we would not likely say a lawyer "cared" for a client if he expressed disdain for his client every moment he was out of earshot of the jury, even if his strategy was brilliant and the outcome flawless.

Of course, there has been endless debate within the profession whether personal intimacy, in fact, gets in the way of the detached judgment necessary to predict an outcome and strategize how a case should be handled. Empirical work does not seem to resolve this question. For example, recent efforts to curb sexual relations between lawyers and clients are premised, in part, on the experience and belief of lawyer disciplinary groups that lawyers involved with their clients cannot make independent judgments in the best interests of their clients, because of their overriding self-interest in the outcome of the case.<sup>184</sup> These anecdotal experiences and others make the friendship model at best a risky one for both lawyer and client.

Like ethics of friendship, care, and dialogical praxis, solidarity is also internal and external, "an attitude and a practice."<sup>185</sup> Solidarity, however, moves beyond a community of feelings to a community of interests and purposes. It gives up a dependence on human emotions

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183. See Ellmann, *supra* note 87, at 2681.

184. See, e.g., Anthony E. Davis & Judith Grimaldi, *Sexual Confusion: Attorney-Client Sex and the Need for a Clear Ethical Rule*, 7 Notre Dame J.L. Ethics & Pub. Pol'y 57, 74 (1993) (stating that "[i]f a lawyer should act on . . . [a] sexual or romantic interest, it can impair his judgment and adversely affect the best interests of the client").

185. Isasi-Díaz, *supra* note 166, at 266.



like affection for a more complex human response, one that includes emotion but is beyond individual feeling. Solidarity comes from human response that is more like a direction for the lawyer's life, a virtue instantiated in habit and practice<sup>186</sup> that is not dependent upon mutual affection or even empathy even though it requires mutual respect.<sup>187</sup> With its simultaneous attention to individual interest and to reciprocity, solidarity "moves away from the false [or at least difficult] notion of disinterest and altruism and demands a love of neighbor that is intrinsic to a love of self."<sup>188</sup>

Like dialogical praxis, solidarity accepts the wisdom of attention to process, for a relationship marked by respectful communication. In the sense that lawyers dominate their clients, it insists that they as oppressors "respond by listening and allowing themselves to be questioned by the oppressed," and that their clients "question and judge the oppressive structures that . . . [lawyers] support and from which they benefit."<sup>189</sup> Solidarity depends upon opening participation to those who have been excluded.

Yet, by contrast to the dialogical praxis model, solidarity does not necessarily privilege speech as the paradigm of human relationality, but at the same time it accepts dialogue as a helpful tool toward a solidary relationship. The dialogical model imagines that human beings are constituted by communication of a very particular type: reciprocal dialogue in which each is able to tell his own story, articulate his interests and advocate for their adoption by the other, all the while listening to the other's story and paying him mutual respect.<sup>190</sup> Ethics is then "removed from the realm of subjective individuality and moved into the realm of language and communication."<sup>191</sup>

A significant difficulty, which the dialogical ethicists are pinpointing as they recite stories of their clients' attempts to make their stories, needs, and goals felt, is that the model effectively presumes the ethical relations of intellectuals as paradigms. "Real" people, including real-life Legal Services clients, are not only inarticulate in this rarified at-

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186. *See id.*

187. *See Alfieri, Reconstructive Poverty*, *supra* note 5, at 2140-42 (arguing that collaboration embodies empathy that need not be fully mutual but must be minimally reciprocal to permit the exchange of "local knowledge about their opposing interpretive communities," which will be necessarily diffuse and partial).

188. Isasi-Díaz, *supra* note 166, at 266. In this definition, love is not defined by individual feelings, but as "a praxis of mutuality: an intentional, reflective action aimed at the building of community of those who struggle against oppression and for justice." *Id.*

189. *Id.* at 267.

190. *See Kupfer, supra* note 48, at 88. Indeed, Habermas's discourse on ethics continues to assume that the individual voluntarily submits to the process of consensus for establishing norms acceptable to all affected by them and agrees to search for valid norms all can consent to, and to be persuaded to accept them once discovered. *See id.*

191. *Id.* (describing Habermas's theory of communicative ethics).

mosphere of discussion, they are often uninterested. The dialogical model often presumes that were they given a hearing, were we able to hear them in their own voices, they would be eager to engage in this sort of dialogue with us. Yet, the stories do not bear this out: While people do, to be sure, want to be heard when they enter the world of law, many of them do not imagine themselves as constituted by dialogue; rather, they consider the hearing an instrumental means of meeting their needs or goals.<sup>192</sup> What gets them going as individuals may not be a discussion of their oppression, but something else—a conversation about the cucumbers they put up, who is fighting with their husbands or courting their daughters, or even the Sunday shoes their children need to hold their heads up in church. Sometimes Sunday shoes just *are* about Sunday shoes, as White seems to suggest in part, not the deeper manifestations of lawyer oppression or welfare indifference clients perceive in their lives. Sometimes dialogue simply gets those with the loudest voices heard.<sup>193</sup>

Solidarity does not put all the weight of equal respect and meaningful lives on the dialogical process, even while it does not discard that process. Rather, it leaves open-ended the needs and interests of the poor and the possibility that clients and their lawyers can find common ground without requiring clients to accept the terrain in which their lawyers work and to accept a description of their lives as “texts” to be interpreted, as a condition of solidary respect. In this sense, the commitment of solidarity is not chosen, like the liberal’s choice to be committed, but arises from history as well as will, encounter as well as separate internal decisions we make about whom we will help and not help. As such, it requires what Fried’s friend does not—it requires criticism as well as support, distance as well as acceptance. Precisely because we are other than the Other, we will see things in different ways; hearing the Other’s story is not succeeded by silence but engagement. Thus, we are co-operators, but we are not co-authors; we work together, but we work within the limits of our own abilities, interests, and perceptions.

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192. Or, as Kimberly O’Leary puts it, “[p]eople may feel that more ‘talk’ and less ‘action’ are not worth their time. . . . [J]obs, school, demands of children, and demands made by the government may persuade many . . . [clients] that there is simply not enough time to participate in this activity,” especially in crisis circumstances. O’Leary, *supra* note 116, at 186. In addition, authorities, such as police and public-housing staff, may see dialogue as a waste of time when they have immediate solutions, and clients may be skeptical that those with power will “actually consider their ideas.” *Id.* O’Leary suggests using dialogue with other traditional legal strategies. *See id.* at 185-88. Handler suggests that the powerless must be given “incentives and the means” to participate in dialogue. Handler, *Search for Community*, *supra* note 6, at 11.

193. Dialogical problem-solving may result in solutions that do not protect the concerns of minorities; dialogue partners will still determine who is permitted into the conversation to ensure that it is based on legitimate goals and efficacious. *See* O’Leary, *supra* note 116, at 187-88.

There is another important, but often overlooked dynamic in solidarity movements: that of celebration. Solidarism permits not only a forward-looking commitment of individuals and groups with mutual interests, but rejoicing over accomplishments of the past. One of my most vivid memories from Legal Services practice is seeing a colleague burst out of his office and literally jump for joy at receipt of a Court of Appeals decision which recognized the right of Indiana's poor to the necessities of life, a right which they could not take for granted before that decision. The one thing missing was our clients: Like many on poor relief, they had no phone and moved from place to place when they got behind in their rent, so my recollection is that it took us awhile to find them to tell the good news. I have often wished we had thought of some way to share that amazing moment, on which many other gains were built, in a more formal way with all of our clients who were affected by the decision, for it was their celebration, their recognition as worthy of the state's concern at stake. Solidarity movements permit people who come from very different lives with very different problems to share both pain and joy, giving lie to any lingering doubt that we are, in fact, defined by our aloneness in the world.

## V. CONCLUSION

An ethics that combines both the recognition that our clients, our Others, are standing over us in threat and in need, and the sense that we are in solidarity even with the unimaginable Other, gives one possibility of understanding what it is to be a Legal Services lawyer and client together. However, this account is not offered as some kind of trump card, triumphantly sweeping away what other ethics have contributed. Solidarity as an ethical argument has its own challenges. Political scientist Jodi Dean has identified three perversions that may attend solidarity, problems not dissimilar to those facing other ethical relations models. These perversions are especially important to guard against, lest the purpose for using the language of solidarity with the poor be lost.<sup>194</sup>

Perhaps the most important of these concerns about an ethics of solidarity in a post-modern culture is that solidarity is often achieved by excluding people from the solidary group, or putting the group over against another group. Solidarity may simply replicate the exclusiveness of the friendship or rights models for lawyering, and preclude the "care" for the enemy that care ethicists have legitimately argued would produce better justice. Dean cites bell hooks's work for an example of how the appeal of the (white) women's liberation movement to the "'sisterhood' of all women . . . predetermined who women are and can be, denied differences among women, and refused to ac-

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194. See Dean, *supra* note 177, at 19-28.

knowledge women's own accountability for their oppression of each other."<sup>195</sup>

Second, in conventional solidarity groups, such as political movements or unions, some alterity of the member Other is necessarily repressed because our focus is on common ties, on expectations *as* members and not *as* others. It is important to remember that "conventional solidarities extend the range of our intersubjective ties at the cost of the 'concrete other,' setting limits on what she can do and how she can be seen."<sup>196</sup>

As importantly, when a solidary group is focused on achievement of a particular goal, dissenting or prophetic voices may be muted, the perceived needs of solidarity forcing the member to a choice between staying silently or being excluded. Dean uses as an example of such suppression the demand that members of the black community not criticize Justice Clarence Thomas for his dismissal of Anita Hill and his attempt to use the history of black oppression to shield himself from criticism. Dean argues that Thomas thus "appealed to a solidarity constructed to keep hidden the sufferings endured by black women,"<sup>197</sup> a solidarity which silences the worst victims of oppression.

These three complaints—exclusion of those who are not members, totalization of individuals who are part of the solidary group, and repression of dissent—are of particular concern to Legal Services lawyers because these are precisely the charges leveled against such lawyers' representation by the dialogical praxis ethicists. The concern is justly lodged that, like young William Simon, clients will be chosen based on their emotional appeal rather than their right to the human dignity of representation; and once chosen, they will be asked to repress their own unique stories in service of the "project"—justice for themselves and for many others. These concerns must be the subject of further thought, to determine whether they eliminate solidarism's attraction as a way of talking about the lawyer-client relationship.

Yet, if joined with an ethics of encounter, solidarity requires opening participation to those who have been excluded, whether they are excluded through membership "criteria" or repressed within the group because they challenge the group's goals or means. As suggested, an ethics of encounter *and* solidarity does not permit us to

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195. *Id.* at 15.

196. *Id.* at 22.

197. *Id.* at 24. Dean claims that Justice Thomas's "lynching" claim evoked a history of punishment of black men for their contact with white women, whereas no black woman's honor had ever been revenged by lynching, for white lynch mobs recognized no honor they were bound to respect. *See id.* The Thomas claim of victimhood thus demanded that "blackness" had to be male blackness, and black women were asked to choose between being black and being a woman. *See id.*; *see also* Marlon Manuel, *Thomas Sharply Defends Conservative Views*, *Atlanta Const.*, July 30, 1998, at A3 (reporting on Justice Thomas's defense of his views before the National Bar Association).

imagine that we are insiders permitting outsiders to come in, or even that we are outsiders being asked by insider clients to come into their world. Rather, we are in relationship with the Other, whether we like it or not; there are no walls separating us from the Other, material walls or ethical walls. Similarly, the ethics of solidarity demands that we do not totalize the other. It is built on mutuality, not on identity; we are committed to each other not because of identical interests but because of similar ones. We are fellow travelers, but not because we go down the same road together. Rather, our lives intersect at critical moments of encounter, when we are bound to each other in a moment of action whether we like it or not. Solidarity respects both bonds and distances, both continuities of terrain and vast gulfs between people, trying to imagine how to act, to work together, in a way that respects both.

Moreover, the post-modern dialogical virtues of criticism and rejoinder can be incorporated as necessary to a reflective solidary practice.<sup>198</sup> The charge that in solidary groups, we diminish each other, totalizing the other to a set of characteristics that "fit" our group can be pled to: While it is not completely true that groups reduce their members to a set of membership characteristics (indeed, working for a common good may be one of the best chances we have to see the Other for all he is in an unselfconscious way), we can, yet, admit that solidary members do not cherish each other in the way that affectional groups do without losing the force of the encounter. For the ethics of encounter focuses on our awareness of the Other in his height/power and his need/vulnerability, not requiring that we cherish and support each other in the ways we expect from our most loved ones. It is precisely the paradox in the ethics of encounter—that we act *against* the world's "common sense," which tells us to love our friends and hate the stranger, to respond to those who have something to give us rather than those who need us, to see height in dominance instead of in need—that gives it such power.

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198. Indeed, Dean's book is an effort to argue for a "reflective solidarity" that recognizes our connection

through our struggle against those who threaten, denigrate, and silence us. . . . [And it] take[s] seriously the ever present fact of exclusion. We can never be sure who "we" are in any final or ultimate sense. Thus, we have to acknowledge the distinction between actual and potential members, the way we may always exclude another.

Dean, *supra* note 177, at 31-32. Unfortunately, I think Dean's proposed method for solving the dilemma—asking group members to create a "hypothetical attitude toward the norms and expectations of their group" and look at the situation from the perspective of the "situated, hypothetical third" who stands outside the immediate situation, *id.* at 33-34, falls prey to the same challenges from post-modernism that Rawlsian liberalism has.

*Notes & Observations*